CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible] 34.

VALENTIN TRONO, MAXIMO ANGELES, AND TIMOTEO NATIVIDAD, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED MAY 24, 1904.

(19,370.)

(19,370.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 719.

VALENTIN TRONO, MAXIMO ANGELES, AND TIMOTEO NATIVIDAD, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

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1 Supreme Court of the United States, Term of 1904.

VALENTIN TRONO ET AL., Plaintiffs in Error,
vs.
UNITED STATES, Defendant in Error. } In Error.

Proceedings had in the court of first instance of the province of Bulacan, Philippine Islands, and in the supreme court of the Philippine Islands.

Be it remembered that heretofore, to-wit, the 13th day of February, 1903. in the justice's court of the town-ship of Hagonoy, province of Bulacan, came Candelaria Santos and filed in the office of the justice of said court a complaint signed and sworn to by the said Candelaria Santos, against Maximo Angeles, Timoteo Natividad and Valentin Trono, in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
Philippine Islands.

In the Court of the Justice of the Peace of Hagonoy, Bulacan.

UNITED STATES
vs.
MAXIMO ANGELES, TIMOTEO TRINIDAD, and VALENTIN T. FELIPE.

FEB. 13, 1903.

2 The undersigned accuses Maximo Angeles, Timoteo Trinidad and Valentin Trono Felipe, inhabitants of this municipality, of the crime of murder committed as follows:

That the said defendants, in this municipality, on the 6th instant, with great cruelty and evident premeditation, caused the death of the son of the complainant, by name Benito Perez, inflicting upon him heavy and mortal blows all over the body and especially in the abdomen, by means of blows given with the butts of guns, they cooperating one with the other. This against the statute in the case made and provided.

CANDELARIA SANTOS (x her mark).

Witnesses:
CANDELARIA DE LOS SANTOS.
ESTANISLAO PEREZ.
POLICARPO GUEVARA.
FELIPE BAUTISTA.
PEDRO F. SANTOS.
ESPERIDION PALAD.

Dr. Icasiano's prescriptions Nos. 1185 and 1186 filled at the drug store.

Signed and sworn to before me this 13th day of February, 1903.

(Signed) MARCELO ESTRELLA,
Justice of the Peace.

[Seal of the Justice of the Peace, Hagonoy-Bulacan.]

That afterwards, to-wit, the 13th day of February, 1903, a preliminary investigation was held in the court of the justice of
3 the peace at Hagonoy, province of Bulacan, Philippine Islands, after which, on said 13th day of February, 1903, the justice of the peace of the said township of Hagonoy, province of Bulacan, Philippine Islands, entered an order directing that the defendants named in the said complaint and plaintiffs in error herein be held for trial before the court of first instance of the said province of Bulacan, Philippine Islands.

That afterwards, to-wit, on the 20th of April, A. D. 1903, a trial was had in the court of first instance of the province of Bulacan, Philippine Islands, before the Honorable Dionisio Chanco, special judge of the said court, upon the same complaint filed by the complaining witness in the justice court of the township of Hagonoy, province of Bulacan aforesaid.

That thereafter, to-wit, the 27th day of April, A. D. 1903, the Honorable Dionisio Chanco, special judge of the said court of first instance of the province of Bulacan, Philippine Islands, entered his decision in the said cause, which decision is in the words and figures following, to-wit:

Decision.

The defendants are charged with the crime of murder, it being alleged that they, with great cruelty and evident premeditation caused the death of Benito Perez by inflicting upon him heavy blows with the butt of a gun.

One Wednesday evening in the month of February of this year, in the township of Hagonoy, province of Bulacan, Philippine Islands, the defendants Maximo Angeles, Valentin Trono,
4 Felipe and Timoteo Natividad—Valentin being a sub-inspector of the municipal police of the said town—together with two policemen, arrested Benito Perez and two other persons who were charged with the theft of a revolver belonging to the defendant Máximo and took the persons so arrested to a place where, after demand was made upon them for the missing revolver, they were beaten with the butts of guns. In consequence of the ill-treatment so received, Benito Perez was left in such a condition that he was compelled to lean upon one of the policemen in order to go to the office of the municipal president where, after a slight investigation, he and his companions were set at large. These facts appear from the testimony of three witnesses, to-wit, the two said com-

panions of Benito and one of the men sent by the mother of the deceased to follow the arresting party and their prisoners. These three witnesses, however, although they did not see the actual ill-treatment because they were some distance away and also because of the darkness of the night, testified to the ill-treatment inflicted upon Benito because of the groans uttered by him, one of the witnesses saying that the three accused beat Benito; the other that it was only Máximo and the last witness that it was Máximo and Valentin. They all agreed that the death of the said Benito was occasioned by the beating so inflicted.

The relatives of Benito Perez testified that he died in consequence of the beating received when he was arrested and that the doctor, Sr. Icasiano, refused to hold an autopsy upon the body and
5 urged them to bury the deceased immediately, upon the ground that he had died of cholera. The municipal physician of the town of Hagonoy, Don Andres Icasiano, testified that in company with the justice of the peace, he visited Benito Perez on two occasions while he was alive and once after his death and testified as to his examination and that the result of the examination was that the deceased had died a natural death and not from the slight contusions which were observed upon him.

The two physicians who rendered a report upon the testimony and certificate of the said municipal physician, Sr. Icasiano, agree with the latter, essentially, upon this subject.

From the result of the testimony, it is to be inferred that, although it has been established that the accused are guilty of the assault which caused contusions of a slight character upon Benito Perez, because they arrested him and took him away for the purpose of beating him, still, the testimony does not show that the said contusions were the actual and proximate cause of the death of the said Benito, and in consequence it follows that the accused are not guilty of the crime of murder, much less of the commission of that crime with great cruelty and evident premeditation, as no proof of these circumstances has been introduced.

As the crime of assault (*lesiones menos graves*) is included in the crime of murder charged in the complaint and as the evidence shows that the defendants are guilty of the former crime, the defendant Valentin having availed himself of his public char-
6 acter as sub-inspector of the municipal police, and the crime having been committed at night, the court, applying section 29 of general order No. 58 and the articles of the Penal Code and other provisions of law applicable to the case, decides that he should convict, and does hereby convict Máximo Angeles, Valentin Trono and Timoteo Natividad as principals of the crime of assault (*lesiones menos graves*) and sentences them to suffer the penalty of six months' imprisonment, to the payment jointly and severally to the heirs of Benito Perez of the sum of one hundred pesos, Mexican currency, with subsidiary imprisonment, in case of insolvency, at the rate of

one day for each twelve and one-half pesetas which they may fail to pay and to the payment of the costs of the prosecution.

It is so ordered.

(S'g'd) DIONISIO CHANCO, *Judge.*

That afterwards, to-wit, the 29th day of April, 1903, came the defendants Máximo Angeles, Valentin Trono and Timoteo Natividad and gave notice of appeal to the supreme court of the Philippine Islands, which said notice of appeal is in words and figures following, to-wit:

UNITED STATES OF AMERICA, *Philippine Islands.*

In the Court of First Instance of Bulacan.

THE UNITED STATES *vs.* MAXIMO ANGELES ET AL. } For Assault (*Lesiones Menos Graves*).

7 The undersigned, prisoners in the jail of this capital, under a decision rendered by this honorable court, of date the 27th of April of the present year and by which they are condemned to six months of imprisonment, respectfully represent:

1. That they appeal from the said decision, and

2. Ask that they be allowed bail pending appeal in accordance with the provisions of general order 58.

Respectfully,

(S'g'd.) MAXIMO ANGELES.
(S'g'd.) VALENTIN TRONO.
(S'g'd.) TIMOTEO NATIVIDAD.

Malolos, April 29, 1903.

That afterwards, to-wit, the 14th day of May, 1903, the clerk of the court of first instance of the province of Bulacan, transmitted the record of said cause, to-wit, The United States *vs.* Trono *et al.* together with the notice of appeal given in said cause, to the supreme court of the Philippine Islands, which said letter of transmittal is in the words and figures following, to-wit:

Court of First Instance, Fifth Judicial District, Province of Bulacan, Philippine Islands.

MALOLOS, *May* 14, 1903.

To the clerk of the supreme court of justice of these islands, Manila, P. I.:

SIR: I have the honor to remit to you herewith criminal
8 case No. 389 prosecuted in this court against Valentin Trono, Maximo Angeles, and Timoteo Natividad, for assault (*lesiones*

menos graves) by virtue of the appeal taken by the said defendants against the judgment rendered therein and beg you to acknowledge receipt of this communication.

Very respectfully,

(S'g'd) ARCADIO PAGINAL,
Clerk of the Court of First Instance of the Province of Bulacan.

{Seal of the Court of First Instance of the Province of Bulacan.}

(Endorsed:) Filed this 21st day of May, 1903, together with the accompanying papers, at 3:55 p. m. F. C. Fisher, clerk of the supreme court. By (s'g'd) J. E. Blanco, deputy.

That thereafter, to-wit, the 12th day of August, 1903, briefs having been filed in the said cause by counsel for the private prosecution, the Government, and the defendants, the said cause of The United States *vs.* Trono *et al.* was tried before the supreme court of the Philippine Islands on the 12th day of August, A. D. 1903, a record of which trial appears from an entry in the minutes of the said supreme court of the Philippine Islands, which said entry is in the words and figures following, to wit:

"The hearing having been announced of case No. 1344, The United States and Candelaria de los Santos *vs.* Valentin Trono
9 *et al.*, Messrs. Calderon and Ferrer, attorneys-at-law appeared on behalf of the defendants, no counsel appearing on behalf of the Government or of the private prosecution. The case was then submitted to the court and taken under advisement."

That afterwards, to-wit, the 19th day of January, 1904, the supreme court of the Philippine Islands announced its decision on the appeal of the said cause No. 1344, United States *vs.* Valentin Trono *et al.*, which said decision is in the words and figures following, to-wit:

THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

THE UNITED STATES *vs.* VALENTIN TRONO, MAXIMO ANGELES, and Timoteo Natividad.	January 19, 1904. Case No. 1344.

MAPA, *J.*:

The defendants, charged with the murder of Benito Perez, were convicted by the trial court of the offense of *lesiones menos graves*,

and sentenced to six months of *arresto mayor*, the payment of one hundred Mexican pesos as damages to the heirs of the deceased, and to the costs of the trial.

From the evidence introduced at the trial it appears that late at night on February 4, 1903, the deceased Benito Perez, Policarpo Guevara and Felipe Bautista, were arrested in their respective
10 houses by the defendants. Valentin Trono was a sub-inspector of the municipal police of the town of Hagonoy; that he was accompanied by two policemen named José and Agustin; that the deceased and his companions Guevera and Bautista were suspected of the theft of a revolver belonging to one Máximo Angeles; that when Benito Perez was arrested he was in good health, not suffering from any disease; that he and his companions were taken by their captors to a place called Sapang-Angelo, and there beaten and ill-treated, and that while they were under-oing this ill-treatment, Benito was heard to beg Máximo to pardon him, uttering the following words: "Máximo, have pity on me or else kill me at once;" that the blows inflicted left Policarpo Guevara breathless for some time, and caused Felipe Bautista to suffer pains in the region of the heart for about an hour; that Benito Perez was so severely ill-treated that in order to reach the municipal building of the town, to which the prisoners were taken after the ill-treatment was inflicted upon them, he was obliged to lean upon the policeman José for the whole distance; that he was unable to stand and furthermore complained of sharp pains in the abdomen; that when the prisoners were brought before the municipal president the following day, they were discharged by him, as nothing was brought out against them in the investigation made concerning the theft of Máximo Angeles' revolver, which had led to their detention; that Benito Perez, on account of the condition in which he had been left, was unable to return to his house alone, and that therefore a brother of his named Estanislao was obliged to take him from the municipal building to his home, in a boat; that upon arrival at his home the de-
11 ceased was obliged to go to bed, and his mother, Candelaria de los Santos, found his condition to be so serious that she immediately reported the facts to the justice of the peace of the town, denouncing the persons who had ill-treated Benito as guilty of the crime of attempted homicide; that during the short time that the deceased was in bed he was unable to eat, urinated with great difficulty, and expelled with his urine drops of blood; that he complained of intense pains in his stomach and told his family that the pains were the result of blows inflicted upon him with a gun, and other ill-treatment received by him, and that his injuries would be the death of him. The deceased died on the morning of the day following, that is, February 6, 1903. At the time that Benito Perez and his companions were arrested, each of the defendants was armed with a revolver, and the policemen José and Agustin were armed with guns.

The defense admit the fact of the arrest of Benito Perez and of Felipe Bautista and Policarpo Guevara by the defendants, but denies

that they ill-treated the said Benito. Nevertheless the proof for the prosecution upon this point is conclusive.

Felipe Bautista and Policarpo Guevara, who were with Benito Perez at the time of his arrest, after testifying that Perez was separated from them by their captors a distance of from eight to ten brazas, at a place called Sapang-Angelo, they proceeded to testify that they heard blows inflicted on Benito and his groans and his supplications to Máximo to pardon him; both of them be-
12 lieved—for they were unable to see owing to the darkness of the night—that the blows were inflicted with a gun, owing to the fact that Máximo Angeles took the gun which was carried by the policeman Agustin, who was standing beside the witness when he commenced to ill-treat Benito.

The testimony of these witnesses has been corroborated by that of Pedro Santos, who was sent together with one Esperidion by Benito's mother, to follow the latter and observe what was being done to him. This witness says that while Benito and his captors were on the edge of the estero and he and his companion Esperidion on the opposite bank some ten brazas away from the place where the others were, he heard them beating Benito with the butt of a gun, and heard the latter's groans and his supplications to Máximo and Valentin for pardon. They testified that they heard him say that if they would not pardon him that they had better put him out of his misery at once.

It was not necessary that the witnesses should see the actual blows struck. It was sufficient that they heard them in order to be able to testify as to the fact that the blows were struck, more especially when the sound of the blows was followed by groans, showing suffering of the victim. The fact that the blows were struck with a gun or some other instrument is a circumstance of so accidental a character that it cannot affect the reality of the facts in the case. Even if the blows had been struck with a club the result would be the same upon proof of the fact that the blows were struck and of the consequences thereof. But in the present case the witness had good reason for believing that the blows were struck with guns, for this was the weapon which Máximo used when striking and beating Benito.
13 It is true that he might have struck him with the hand alone or with a revolver, which Máximo also carried on that occasion (it does not appear that he had any other weapon); but we believe that it cannot be absolutely asserted that it is impossible to distinguish by the sense of hearing blows given with the hand or with a revolver from those caused by a gun, taking into consideration the larger dimension and weight of the latter weapon, and consequently the greater force and increased sound which would be produced by the blows inflicted with such an implement.

In addition to what has been testified by the foregoing witnesses, there is material evidence of the battery of Benito Perez shown by the testimony of Felipe Bautista and Policarpo Guevara, who testified that after hearing the blows given to the former, they saw him

unable to stand, and complaining of sharp pains in the abdomen, and being compelled to walk leaning on the policeman José in order to be able to reach the municipal building of the town.

Evidence is likewise found in the fact that different parts of his body, such as the neck, hands, ribs, arms and abdomen were seen by the witnesses Estanislao Perez, Raymunda Perez, Juliana de los Santos and Candelaria de los Santos, to be bruised and swollen.

The municipal president of Hagonoy, José R. Lopez, a witness on behalf of the defense, likewise must have observed something abnormal about Benito Perez when brought before him on the following morning, because he inquired of him, as testified by said presidente, whether he was ill, to which Benito replied that
14 he was. The president testified that what moved him to make such inquiry was the fact that he noticed that Benito's face was pale; but according to Policarpo Guevara this was due to the fact that Benito was unable to remain on his feet in the presence of the president, in spite of the orders of the accused, Valentin, who told him to stand up. We give credit to the statement of the witness Guevara because it is not natural that the mere pallor on the face of a person who appears before an official accused of a crime should attract the latter's attention to the point of moving him to inquire whether he was ill or not.

The partiality of President Lopez in favor of the accused Valentin Trono is explained at once if it be taken into account that on being questioned during the trial what relationship he had with Valentin he replied that he *refused to testify as to family secrets.*

The very doctor, Andrés Icasiano, who examined Benito Perez, notwithstanding his manifest, clear and evident tendency to favor the accused, was forced to certify that there appeared on the upper part of the left iliac region near the edge of the innominate bone two bruises caused by an instrument causing a contusion, one of the size of a half dollar and the other the size of a twenty cent piece.

The foregoing details show likewise the seriousness of the *lesiones* of Benito Perez. They broke him down to such an extent that he was unable to again stand up from the moment he received the blows until the moment of his death. He was unable to reach the municipal building without the support of the policeman José,
15 neither was he able to walk to his home, but was conveyed in a banca. His condition was so serious when he arrived at the latter place that his mother, Candelaria de los Santos, justly alarmed, went without loss of time to file an information before the justice of the peace against the authors of the crime, for attempted homicide. The physician, Icasiano, who examined Benito by order of the justice, called upon him twice on the same night, with an interval of two hours only, which shows that he had fully realized the serious condition of his patient. The latter in the meantime was unable to take any food. He could only urinate a few drops of blood and felt continuous and sharp pains in the abdomen, which he attributed to the blows and ill treatment to which he had been

subjected; he felt that he was dying; he so advised his family and a few hours later the crisis came and he passed away. All this is proven by the combined testimony of the witnesses already mentioned, Candelaria and Juliana de los Santos, Estanislao and Raymunda Perez and Policarpo Guevara and Felipe Bautista.

The defense contends that the death of Benito Perez was not due to the *lesiones* inflicted on him, which were not serious, but to hepatic colic brought on by hypertrophic cirrhosis from which the deceased had been suffering for a long time, basing such allegation on the certificate and testimony of the physician, Don Andrés Icasiano, wherein such a statement is made.

We cannot give any credit to the testimony of this physician, because the facts which would serve as a foundation to his conclusion are manifestly inexact.

16 In the first place, in his certificate on folio 18 it is stated that the body of the deceased only showed two small bruises on the superior part of the left iliac region. The witness Esteban Perez testified that the deceased had bruises and swellings on the superior part of the left hand, on the neck, on the ribs and on the abdomen; Raymunda Perez affirms having seen bruises on the abdomen on both sides, on the left arm, and on the left side of the neck; and Candelaria de los Santos likewise saw them on the upper part of the left hand and on the left side of the neck and on the ribs.

In the second place, the physician affirms that the deceased devoted himself on the night of the occurrence to his *customary libations*. Nothing is shown in the case to corroborate this alleged habit; and especially nobody testified to having seen the deceased drunk on the night of the occurrence.

In the third place it is stated in said certificate of the physician that the deceased, *after the blows the effects whereof are being inquired into, went on foot to the town from a distant barrio, and vice versa.* This is manifestly untrue, because the proof in this case shows that from the place where the deceased was ill treated, he was compelled to walk, being supported by a policeman until he reached the town, and in order to take him from the town to his home it was necessary to use a boat.

These last statements are so unjustified that the physician Icasiano, when testifying, withdrew them during the trial. Why, then, did he set them forth in the certificate which appears on folio 18?

17 There is nothing in the case to show that the deceased had ever suffered from hypertrophic cirrhosis. The ailment which the deceased had at the time referred to by the physician Icasiano was cholera, according to the mother of the deceased, Candelaria de los Santos, who testified, besides, referring to the time to which this case refers, that her son was of a robust constitution and suffered no ailments whatever.

There are, besides, the following facts to be taken into consideration: After the physician Icasiano had examined the deceased, and

while the latter was still alive, he told Raymunda Perez that the deceased was suffering from *blows with a rifle*.

When the death had taken place, the family of the deceased repeatedly requested the physician Icasiano to examine the body, which the latter flatly refused to do, and warned them on the other hand to bury him quickly, under the pretext that he had died of cholera.

It likewise appears from the testimony of Raymunda Perez that said physician is an intimate friend of the accused Máximo Angeles.

Expert testimony no doubt constitutes evidence worthy of meriting consideration, although not exclusive, on questions of a professional character. The courts of justice however are not bound to submit their findings necessarily to such testimony; they are free to weigh them, and they can give or refuse to give them any value as proof, or they can even counterbalance such evidence with the other elements of conviction which may have been adduced during the trial. In the present case there are to be found sufficient data which show in a conclusive manner the seriousness of the
18 *lesiones* inflicted upon the deceased, which from the very first moment prevented him from keeping on his feet, and caused him continuous and sharp pains in the abdomen and retention of the urine—symptoms which constantly showed themselves until death came, which in the absence of satisfactory proof to the contrary may be attributed to these causes, which undoubtedly were sufficient in themselves to bring about the death of the deceased.

The guilt of the accused is fully established in this case. They arrested the deceased and took him out of his house. They took him to a place called Sapang-Angelo, and they likewise committed the act of which they are charged. Nevertheless, their participation in the execution thereof was not equal. Máximo Angeles and Valentin Trono's participation was evidently direct and immediate, because they ill treated and assaulted the deceased as appears from the testimony of Policarpo Guevara and Pedro Santos, as stated by the deceased himself to his mother, Candelaria de los Santos and Juliana de los Santos.

With regard to Máximo Angeles, there likewise exists the testimony of Felipe Bautista, who says that this defendant ill treated and struck the deceased. Angeles and Trono are therefore to be considered as the authors by direct participation of the death of Benito Perez.

As to the other defendant, Timoteo Natividad, his co-operation was in the nature of protection and aid, for even if it is true that he accompanied his co-defendants and was likewise present with them in the place where the crime was committed, it does not appear, nevertheless, that he took any direct part in the ill treatment of the deceased; and for this reason he should be considered only as an accomplice of the two first named.

19 There is to be taken into account the aggravating circumstances of committing the deed at night, and abuse of superi-

ority, which should be compensated with the mitigating circumstance of the defendants not having the intention of causing an evil so great as that which was actually produced, for an examination of the record fully convinces us that when the former ill treated and struck Benito Perez, they did not have in mind the deliberate intent of depriving him of his life, but only that of forcing him by such means to return the revolver which they claimed had been stolen.

We therefore reverse the judgment appealed from, and sentence the defendants Máximo Angeles and Valentin Trono to the penalty of fourteen years, eight months and one day of *reclusión temporal*, and Timoteo Natividad to the penalty of eight years and one day of *prision mayor*, and all three to the payment of an indemnity consisting of five hundres pesos, Philippines currency, to the heirs of the deceased, and to the payment of the costs in this instance.

It is so ordered.

Concurred in by Arellano, C. J., and Torres, Cooper, McDonough and Johnson, J. J.

WILLARD, *J.*, dissenting:

Believing that the defendant Timoteo Natividad should be condemned as a co-principal, I do not agree with the penalty imposed upon said defendant.

That afterwards, to-wit, the 25th day of January, 1904, came the defendants Valentin Trono, Maximo Angeles and Timoteo Natividad, by their attorneys Felix Ferrer and W. A. Kincaid and gave notice of exception to the said decision, which notice is in the words and figures following, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Complainant and Appellee,
vs.
VALENTIN TRONO, MÁXIMO ANGELES, and TIMOTEO Natividad, Defendants and Appellants. } No. 1344.

Now come the defendants and appellants in the above-entitled cause and state to this honorable court that they except to the decision dated the 19th of January, 1904, and pray that their exception be allowed as taken in due time and form.

Manila, January 23, 1904.

(Signed) FELIX FERRER,
(Signed) W. A. KINCAID,
Attorneys for the Defendants and Appellants.

(Endorsed:) Filed in the clerk's office of the supreme court of the Philippine Islands this 25th day of January, 1904, at 8:30 a. m. (Signed) J. E. Blanco, clerk.

That afterwards, to-wit, the 25th day of January, 1904, came
21 the said defendants and appellants in the case of The United States *vs.* Valentin Trono, Máximo Angeles and Timoteo Natividad and moved the said supreme court of the Philippine Islands for a re-hearing of the said cause, which motion for a re-hearing is in the words and figures following, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Complainant and Appellee,
vs.
VALENTIN TRONO, MAXIMO ANGELES, and TIMOTEO NATIVIDAD, Defendants and Appellants.

Now come the defendants and appellants, Valentin Trono, Máximo Angeles and Timoteo Natividad, in the above entitled cause and pray the court to set aside its decision in the said cause entered the 19th day of January, 1904 and to grant them a re-hearing therein, for the following reasons:

1. The court erred in convicting Máximo Angeles and Valentin Trono of the crime of homicide after they were put in jeopardy in the court of first instance for the said crime and had been acquitted thereof after regular and final trial.

2. The court erred in convicting Timoteo Natividad as an accomplice of the crime of homicide after he had been placed in jeopardy in the court of first instance for the said crime and acquitted thereof after a regular and final trial.

3. The judgment of the court of first instance convicting the defendants and appellants upon a complaint charging the crime
22 of murder, was an acquittal of the crime charged in the complaint as also of the crime of homicide, and of all crimes charged in the complaint higher in degree than the crime of assault, (*lesiones menos graves.*)

4. The decision of the court convicting the defendants Valentin Trono and Maximo Angeles of the crime of homicide is in violation of the act of Congress of the United States for the Philippines passed the first day of July, 1902, by which it is provided that "no person for the same offense shall be twice put in jeopardy of punishment."

5. The judgment of the court condemning the defendant Timoteo Natividad as an accomplice of the crime of homicide is in violation of the law of the Congress of the United States for the Philippine Islands enacted by Congress the first day of July, 1902, by which it is

provided that "no person for the same offense shall be twice put in jeopardy of punishment."

6. The complaint, comprising as it does every crime of violence from murder to assault, the final judgment of the court of first instance put an end forever to all inquiry into these crimes, with the exception of the crime of assault (*lesiones menos graves*) or crimes of less degree and the power of this court upon appeal was limited to affirming the judgment of the court of first instance convicting the accused and appellants for the crime of assault (*lesiones menos graves*) or to reverse the said decision, but this court was without power to reverse the said judgment and convict the defendants of the crime of homicide of which they were acquitted by the final judgment of the court of first instance.

23 The issues presented by this motion have been discussed so many times in this court that we refrain from commenting upon them and the motion is respectfully submitted to the court for its decision.

Manila, January 25, 1904.

(Signed) FELIX FERRER,
" W. A. KINCAID,
Attorneys for the Defendants and Appellant, Valentin Trono, Máximo Angeles, and Timoteo Natividad.

(Endorsed:) Filed in the clerk's office of the supreme court of the Philippine Islands this 25th day of January, 1904, at 8:30 a. m.

(S'g'd) J. E. BLANCO, *Clerk.*

Afterwards, to-wit, the 26th day of January, 1904, the supreme court of the Philippine Islands entered an order upon its minutes of that date, which said order is in the words and figures following, to-wit:

"The clerk having reported upon a petition presented by Mr. Kincaid in case No. 1344, United States *vs.* Valentin Trono *et al.* stating that they excepted to the decision rendered in the said cause and praying for a re-hearing therein, the court resolved that the re-hearing be denied."

Afterwards, to-wit, the 27th day of January, 1904, the defendants Valentin Trono, Máximo Angeles and Timoteo Natividad, by their attorneys Messrs. Ferrer and Kincaid, excepted to the order of the supreme court of the Philippine Islands denying the re-hearing prayed for, which said notice of exception is in the words and figures following, to-wit:

24 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Complainant and Appellee,
vs.
VALENTIN TRONO, MÁXIMO ANGELES, and TIMOTEO Natividad, Defendants and Appellants. } No. 1344.

Now come the defendants and appellants and to the court respectfully state that they except to the resolution of the court dated the 26th inst. in the above entitled cause and pray the court to accept this exception as presented in due time and form.

Manila, January 27, 1904.

(Signed) FELIX FERRER,
(Signed) W. A. KINCAID,
Attorneys for the Defendants and Appellants, Valentin Trono, Maximo Angeles, and Timoteo Natividad.

(Endorsed:) Filed in the clerk's office of the supreme court of the Philippine Islands this 27th day of January, 1904, at 2:35 p. m.

(Signed) J. E. BLANCO, *Clerk*,
By H. D. McGEORGE, *Deputy*.

That afterwards, to-wit, the 2nd day of February, 1904, the clerk of the supreme court of the Philippine Islands entered judgment in cause No. 1344, United States *vs.* Valentin Trono *et al.* in con-
25 formity with the decision and order for judgment of the said supreme court of January 19, 1904, which said judgment is in the words and figures following, to-wit:

UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

THE UNITED STATES, Complainant and Appellee,
vs.
VALENTIN TRONO, MÁXIMO ANGELES, and Timoteo Natividad, Defendants and Appellants. } February 2, 1904. Docket No. 1344.

The court having acquired jurisdiction for the trial of the above-entitled cause which has been submitted by both parties for decision, and after consideration thereof by the court upon the record and its

decision, an order for judgment having been filed the 19th day of January, 1904.

By virtue of said order it is hereby decreed that the judgment of the court of first instance of Bulacan, dated the 27th day of April, 1903, and against which the above-mentioned appeal was taken, is reversed, and the defendants Máximo Angeles and Valentin Trono are condemned to the penalty, each one, of fourteen years, eight months and one day of *reclusion temporal* and Timoteo Natividad to the penalty of eight years and one day of *prision mayor* and all three to the indemnification of five hundred Philippine pesos to the heirs of the deceased and to the payment of the costs of this instance.

26 It is also ordered that the said cause be remanded to the said court of first instance for the corresponding effects.

(Signed) J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

[Seal of the Supreme Court of the Philippine Islands.]

That afterwards, to-wit, the 2nd day of February, 1904, the said defendants and appellants Valentin Trono, Máximo Angeles and Timoteo Natividad, by their attorneys Messrs. Ferrer and Kincaid, excepted to the said judgment, which exception is in the words and figures following, to-wit:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Complainant and Appellee,
vs.
VALENTIN TRONO, MAXIMO ANGELES, and TIMOTEO NATIVIDAD,
Defendants and Appellants.

Now come Valentin Trono and Máximo Angeles, the accused in the above entitled cause, and inform the court that they except to the judgment entered in the said cause on this date and pray that their exception be accepted as presented in due time and form.

(S'g'd) FELIX FERRER,
(S'g'd) W. A. KINCAID,
Attorneys for the Excepting Parties.

Manila, P. I., February 2, 1904.

27 That afterwards, to-wit, the 2nd day of February, 1904, there was filed in the clerk's office of the supreme court of the Philippine Islands by Messrs. Ferrer and Kincaid, attorneys for the defendants and appellants, a petition for a writ of error, which petition is in the words and figures following:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,
vs.
VALENTIN TRONO, MAXIMO ANGELES, and TIMOTEO NATIVIDAD, Defendants and Appellants.

Petition for Writ of Error.

Come Valentin Trono and Maximo Angeles defendants and appellants in the above entitled cause and represent:—

I.

That judgment has been rendered in said cause by virtue of which the judgment of the court of first instance convicting petitioners for the offense of *lesiones menos graves* has been revoked and defendants convicted of the crime of *homicidio*, notwithstanding the provision in the Philippine bill which declares: "No person for the same offense shall be twice put in jeopardy of punishment."

II.

Wherefore petitioners pray that they be granted a writ of error from the Supreme Court of the United States to the supreme
28 court of these islands with a supersedeas of the judgment and that upon the execution and approval of a bond for such sum as may be deemed sufficient conditioned as required by law they be admitted to bail pending such writ of error, in order that the judgment may be revised by the Supreme Court of the United States upon the assignment of errors which is presented with this petition.

They also pray that the records of the cause be ordered translated from Spanish to English in conformity with the rule prescribed by the Supreme Court of the United States.

(Signed) FELIX FERRER,
(Signed) W. A. KINCAID,
Attorneys for Petitioners.

(Endorsed:) Filed in the clerk's office of the supreme court of the Philippine Islands this 2nd day of February, 1904. (S'g'd) J. E. Blanco, clerk.

That afterwards, to-wit, the 2nd day of February, 1904, there was filed in the clerk's office of the supreme court of the Philippine Islands, an assignment of errors, which assignment of errors is in the words and figures following:

Assignment of Errors.

Supreme Court of the United States.

In the Matter of the Petition of VALENTIN TRONO, MAXIMO Angeles, and Timoteo Natividad, Plaintiffs in Error,
vs.
THE UNITED STATES, Defendant in Error.

29 Come Valentin Trono and Máximo Angeles, and say that in the record and proceedings in the above-entitled cause there is manifest error, in this, to-wit:

I.

It appears that Máximo Angeles and Valentin Trono have been convicted in the supreme court of the Philippine Islands of the crime of *homicidio*, after having been placed in jeopardy of punishment for said crime and acquitted thereof in the court of first instance at the end of a regular and definite trial.

II.

It appears that Valentin Trono and Máximo Angeles were duly charged in the court of first instance with the crime of *asesinato* and that at the end of a regular and definite trial in the court of first instance they were convicted of the offense of *lesiones menos graves*, a lower degree of the crime of *asesinato* and that afterwards the supreme court of the Philippine Islands revoked the judgment of the court of first instance and convicted them of the crime of *homicidio* also included in and being a lower degree of the crime of *asesinato* but a higher degree than that of *lesiones menos graves*.

Wherefore, said Valentin Trono, and Máximo Angeles pray that the judgment of the supreme court of the Philippine Islands be reversed and the judgment of the court of first instance be reinstated.

Manila, 2nd day of February, 1904.

(Signed) FELIX FERRER,
(Signed) W. A. KINCAID,
Attorneys for the Plaintiffs in Error,
26 *Plaza Cervantes, Manila, P. I.*

30 (Endorsed:) Filed in the clerk's office of the supreme court of the Philippine Islands this 2nd day of February, 1904. (Signed) J. E. Blanco, clerk.

That afterwards, to-wit, the 2nd day of February, 1904, a writ of error was duly granted by the Honorable Victorino Mapa, one of the associate justices of the supreme court of the Philippine Islands,

in said cause, which said writ of error and the order allowing the same are in the words and figures following:

THE UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable judges of the supreme court of the Philippine Islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the Philippine Islands, before you, or some of you, between The United States, plaintiff and appellee, and Valentin Trono, Máximo Angeles and Timoteo Natividad, defendants and appellants, a manifest error hath happened to the great damage of the said Valentin Trono and Máximo Angeles, as by their complaint appears.

We being willing that error, if any hath been, should be
31 duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, *we* command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd day of April, 1904, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 2nd day of February, in the year of our Lord, 1904.

(S'g'd) J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

The foregoing writ of error is allowed to operate as a supersedeas of the judgment complained of, and upon the execution of a bond by Máximo Angeles in the sum of ten thousand ($10,000.00) dollars, and by Valentin Trono in the sum of five thousand ($5,000.00) dollars, payable to the defendant in error, conditioned as required by law, to be approved by me, they shall respectively be entitled to their liberty pending such writ of error.

(S'g'd) VICTORINO MAPA,
Associate Justice of the Supreme Court of the Philippine Islands.

(Endorsed:) Filed in the clerk's office of the supreme court
32 of the Philippine Islands this 2nd day of February, 1904, at 2 p. m. J. E. Blanco, clerk, by (s'g'd) H. D. McGeorge, deputy.

That afterwards, to-wit, the 2nd day of February, 1904, a citation was issued in the cause of Valentin Trono, *et al.* plaintiffs in error against The United States, defendant in error, which said citation is in the words and figures following, to-wit:

THE UNITED STATES OF AMERICA, *ss:*

To Gregorio Araneta, acting attorney general for the Philippine Islands:

You are hereby cited and admonished to be in and appear at the Supreme Court of the United States, to be holden at Washington, within sixty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the supreme court of the Philippine Islands, wherein Valentine Trono and Maximo Angeles are plaintiffs in error and The United States is defendant in error to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of February, in the year of our Lord 1904.

(S'g'd) VICTORINO MAPA,
Associate Justice of the Supreme Court of the Philippine Islands.

33 (Endorsed:) Filed in the clerk's office of the supreme court of the Philippine Islands this 3rd day of February, 1904. (S'g'd) J. E. Blanco, clerk.

I admit the receipt of a copy of the above citation and accept service thereof as though regularly had, this February 2, 1904.

(Signed) GREGORIO ARANETA.

Copy received this 3rd day of February, 1904, for the Hororable Gregorio Araneta.

(Signed) RAMON AVANCEÑA.

That afterwards, to-wit, the 5th day of February, 1904, the supreme court of the Philippine Islands acting upon the petition dated February 2, 1904, presented by Messrs. Kincaid and Ferrer in cause No. 1344, United States *vs.* Valentin Trono *et al.* praying that the court. direct that the cause be translated from Spanish to English, the court resolved that the application be granted and that the said translation be made at the expense of the defendants and appellants

That afterwards, to-wit, the 6th day of February, 1904, there was filed in the clerk's office of the said court in the above entitled case,

a bond, which said bond is in the words and figures following, to-wit:

UNITED STATES OF AMERICA, }
Philippine Islands. }

THE UNITED STATES, Plaintiff and Appellee,
versus
VALENTIN TRONO, MAXIMO ANGELES, and TIMOTEO NATIVIDAD, Defendants and Appellants.

34 PHILIPPINE ISLANDS, }
City of Manila, } *ss:*

Whereas Máximo Angeles, one of the defendants and appellants in the above entitled cause has been convicted in the supreme court of the Philippine Islands of the crime of *homicidio* and has sued out a writ of error from the Supreme Court of the United States to the supreme court of the Philippine Islands to reverse said judgment, and

Whereas by order of the Honorable Victorino Mapa, associate justice of the supreme court of the Philippine Islands who allowed said writ of error the said Máximo Angeles has been admitted to bail pending such writ of error in the sum of ten thousand ($10,000.00) dollars.

Now, therefore, we, the said Máximo Angeles as principal and Francisco Nabong and Juan Flores, of Hagonoy, of the province of Bulacan, as sureties, jointly and severally hereby undertake that the above named Máximo Angeles will pay such fine as the Supreme Court of the United States may direct, or will surrender himself in execution of such judgment as the said court may render, or that in case the cause is remanded for a new trial he will appear in the court to which it may be remanded and submit himself to the orders and processes thereof, or if he fails to perform any of these conditions that he will pay to the United States the sum of ten thousand ($10,000.00) dollars.

Witness our hands this the 4th day of February, in the year of our Lord, 1904.

(Signed) MÁXIMO ANGELES.
(Signed) FRANCISCO NABONG.
(Signed) JUAN FLORES.

35 Approved:
(S'g'd) VICTORINO MAPA,
Associate Justice of the Supreme Court of the Philippine Islands.

PHILIPPINE ISLANDS, } ss:
City of Manila, }

Before me the undersigned authority on this day personally appeared Francisco Nabong and Juan Flores, who being by me duly sworn, each for himself, deposes and says: That he is worth the amount specified in the above undertaking over and above all just debts, obligations and property exempt from execution.

(Signed) FRANCISCO NABONG.
(Signed) JUAN FLORES.

Subscribed and sworn to before me this 4th day of February, A. D., 1904.

[Seal of Lorenzo A. Barretto, Notary Public.]

(Signed) LORENZO A. BARRETTO,
Notary Public.

My commission expires January 1, 1905.

(Endorsed:) Filed in the office of the clerk of the Philippine Islands this 6th day of February, 1904, at 10.05 a. m. J. E. Blanco, clerk, by (s'g'd) H. D. McGeorge, deputy.

That afterwards, to-wit, the 6th day of February, 1904,
36 there was filed in the clerk's office of the said court, in the above entitled case, a bond, which said bond is in the words and figures following, to-wit:

UNITED STATES OF AMERICA, }
Philippine Islands. }

THE UNITED STATES, Plaintiff and Appellee,
versus
VALENTIN TRONO, MÁXIMO ANGELES, and TIMOTEO NATIVIDAD,
Defendants and Appellants.

Whereas, Valentin Trono, one of the defendants and appellants in the above entitled cause has been convicted in the supreme court of the Philippine Islands of the crime of *homicidio* and has sued out a writ of error from the Supreme Court of the United States to the supreme court of the Philippine Islands to reverse said judgment, and

Whereas by order of the Honorable Victorino Mapa, associate justice of the supreme court of the Philippine Islands who allowed said writ of error the said Valentin Trono has been admitted to bail pending such writ of error in the sum of five thousand ($5,000.00) dollars.

Now, therefore, we, the said Valentin Trono as principal and Bonifacia Lopez a married woman with the consent of her husband Jose R. Lopez who executes this obligation in the name of
37 his said wife and attaches hereto his power of attorney in proof of that fact and as evidence of his consent to the celebration of this contract by her, and Gregoria Trono, of Hagonoy, of the province of Bulacan, as sureties, jointly and severally, hereby undertake that the above named Valentin Trono will pay such fine as the Supreme Court of the United States may direct, or will surrender himself in execution of such judgment as the said court may render, or that in case the cause is remanded for a new trial he will appear in the court to which it may be remanded and submit himself to the orders and processes thereof, or if he fails to perform any of these conditions that he will pay to the United States the sum of five thousand ($5,000.00) dollars.

Witness our hands this the 4th day of February, in the year of our Lord, 1904.

(Signed) VALENTIN TRONO.
(Signed) GREGORIA TRONO.
(Signed) BONIFACIA LOPEZ,
By her att'y-in-fact, J. R. LOPEZ.

Approved:
(S'g'd) VICTORINO MAPA,
Associate Justice of the Supreme Court of the Philippine Islands.

PHILIPPINE ISLANDS, } ss:
City of Manila, }

Before me the undersigned authority on this day personally appeared José R. Lopez, who says on his oath that his wife Bonifacia Lopez for whom he executed the foregoing obligation is worth
38 the amount specified in the above undertaking over and above all just debts, obligations and property exempt from execution.

(Signed) J. R. LOPEZ.

Before me the undersigned authority on this day personally appeared Gregoria Trono who being by me duly sworn deposes and says: that she is worth the amount specified in the above undertaking over and above all just debts, obligations and property exempt from execution.

(Signed) GREGORIA TRONO.

Subscribed and sworn to before me by José R. Lopez and Gregoria Trono, this 4th day of February, A. D. 1904.

(Signed) LORENZO A. BARRETTO,
Notary Public.

[Seal of Lorenzo A. Barretto, Notary Public.]

My commission expires Jan. 1, 1905.

(Endorsed :) Filed in the office of the clerk of the supreme court of the Philippine Islands this 6th day of February, 1904, at 10:05 a. m.

(S'g'd) J. E. BLANCO, *Clerk.*

That afterwards, to wit, the 13th day of February, 1904, a petition for a writ of error was filed in the clerk's office of the supreme court of the Philippine Islands, which said petition is in the words and figures following:

39 In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,
versus
VALENTIN TRONO, MÁXIMO ANGELES, and TIMOTEO NATIVIDAD, Defendants and Appellants.

Petition for Writ of Error.

Comes Timoteo Natividad one of the defendants and appellants in the above entitled cause and represents:

I.

That judgment has been rendered in said cause by virtue of which the judgment of the court of first instance convicting petitioner for the offense of *lesiones menos graves* has been revoked and defendant convicted as an accomplice of the crime of *homicidio*, notwithstanding the provision in the Philippines bill which declares: "No person for the same offense shall be twice put in jeopardy of punishment."

II.

Wherefore petitioner prays that he be granted a writ of error from the Supreme Court of the United States to the supreme court of the Philippine Islands with a supersedeas of the judgment, and that upon the execution and approval of a bond for such sum
40 as may be deemed sufficient conditioned as required by law he be admitted to bail pending such writ of error, in order that the judgment may be revised by the Supreme Court of the United States upon the assignment of errors which is presented with this petition.

He also prays that the records of the cause be ordered translated from Spanish to English in conformity with the rule prescribed by the Supreme Court of the United States.

(Signed) W. A. KINCAID,
Attorney for Petitioner.

(Endorsed :) Filed in the office of the clerk of the supreme court of the Philippines, this 13th day of February, 1904. (Signed) J. E. Blanco, clerk.

That afterwards, to-wit, the 13th day of February, 1904, there was filed in the clerk's office of the said court, an assignment of errors in the said cause, which said assignment of errors is in the words and figures following, to-wit:

Assignment of Errors.

Supreme Court of the United States.

In the Matter of the Petition of TIMOTEO NATIVIDAD, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

Comes Timoteo Natividad and says that in the record and proceedings in the above entitled cause there is manifest error, in this, to-wit:

41 I.

It appears that Timoteo Natividad has been convicted in the supreme court of the Philippine Islands as an accomplice of the crime of *homicidio* after having been placed in jeopardy of punishment therefor and acquitted thereof in the court of first instance at the end of a regular and definite trial.

II.

It appears that Timoteo Natividad was duly charged in the court of first instance with the crime of *asesinato* and that at the end of a regular and definite trial in the court of first instance he was convicted of the offense of *lesiones menos graves* a lower degree of the crime of *asesinato* and that afterwards the supreme court of the Philippine Islands revoked the judgment of the court of first instance and convicted him as an accomplice of the crime of *homicidio* also included in and being a lower degree of the crime of *asesinato* but a higher degree than that of *lesiones menos graves*.

Wherefore, said Timoteo Natividad prays that the judgment of the supreme court of the Philippine Islands be reversed and the judgment of the court of first instance be reinstated.

(Signed) W. A. KINCAID,
Attorney for the Plaintiff in Error,
26 Plaza Cervantes, Manila, P. I.

Manila, 13th day of February, 1904.

(Endorsed:) Filed in the office of the clerk of the supreme court, this 13th day of February, 1904. (Signed) J. E. Blanco, clerk.

42 That afterwards, to-wit, the 15th day of February, 1904, a writ of error was filed in the clerk's office of the supreme

court of the Philippine Islands, together with an order allowing the same, which said writ and order are in the words and figures following, to-wit:

THE UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable judges of the supreme court of the Philippine Islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the Philippine Islands, before you, or some of you, between the United States, plaintiff and appellee, and Valentin Trono, Máximo Angeles and Timoteo Natividad, defendants and appellants, a manifest error hath happened to the great damage of the said Timoteo Natividad as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, *we* command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to
43 the Supreme Court of the United States, together with writ, so that you have the same at Washington on the — day of —— 1904, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 15th day of February in the year of our Lord, 1904.

(Signed) J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

The foregoing writ of error is allowed to operate as a supersedeas of the judgment complained of and upon the execution of a bond by Timoteo Natividad in the sum of two thousand five hundred dollars ($2,500.00) payable to the defendant in error conditioned as required by law, to be approved by me, he shall be entitled to his liberty pending such writ of error.

(Signed) VICTORINO MAPA,
Associate Justice of the Supreme Court of the Philippine Islands.

(Endorsed:) Filed in the office of the clerk of the supreme court of the Philippines this 15th day of February, 1904.

(Signed) J. E. BLANCO, *Clerk.*

That afterwards on the 15th day of February, 1904, there was filed in the clerk's office of the supreme court of the Philippine

Islands a bond, which said bond is in the words and figures following, to-wit:

44 UNITED STATES OF AMERICA,
Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,
versus
VALENTIN TRONO, MÁXIMO ANGELES, and TIMOTEO NATIVIDAD,
Defendants and Appellants.

Whereas Timoteo Natividad, one of the defendants and appellants in the above entitled cause has been convicted in the supreme court of the Philippine Islands as an accomplice of the crime of *homicidio* and has sued out a writ of error from the Supreme Court of the United States to the supreme court of the Philippine Islands to reverse said judgment, and

Whereas by order of the Honorable Victorino Mapa, associate justice of the supreme court of the Philippine Islands who allowed said writ of error the said Timoteo Natividad has been admitted to bail pending such writ of error in the sum of two thousand five hundred ($2,500.00) dollars.

Now, therefore, we, the said Timoteo Natividad as principal and Ponciano Tiongson, of Bulacan, and Eugenio Guerra, of Hagonoy, of the province of Bulacan, as sureties jointly and severally hereby undertake that the above named Timoteo Natividad will pay such fine as the Supreme Court of the United States may direct, or will surrender himself in execution of such judgment as the said
45 court may render, or that in case the cause is remanded for a new trial he will appear in the court to which it may be remanded and submit himself to the orders and processes thereof, or if he fails to perform any of these conditions that he will pay to the United States the sum of two thousand five hundred ($2,500.00) dollars.

Witness our hands this the — day of February, in the year of our Lord, 1904.

(Signed) TIMOTEO NATIVIDAD.
(Signed) PONCIANO TIONGSON.
(Signed) EUGENIO GUERRA.

Approved:
(S'g'd) VICTORINO MAPA,
Associate Justice.

PHILIPPINE ISLANDS, *City of Manila,* } *ss:*

Before me the undersigned authority on this day personally appeared Ponciano Tiongson and Eugenio Guerra, who being by me duly sworn, each for himself, deposes and says: that he is worth

the amount specified in the above undertaking over and above all just debts, obligations and property exempt from execution.

(Signed) PONCIANO TIONGSON.
(Signed) EUGENIO GUERRA.

Subscribed and sworn to before me this — day of February, A. D. 1904.

[Seal of Lorenzo A. Barretto, Notary Public.]

(Signed) LORENZO A. BARRETTO,
Notary Public.

My commission expires January 1st, 1905.

46 (Endorsed:) Filed in the supreme court this 15th day of February, 1904. (Signed) J. E. Blanco, clerk.

That afterwards, to-wit, the 16th day of February, 1904, a citation was filed in the clerk's office of the supreme court of the Philippine Islands, which said citation is in the words and figures following;

THE UNITED STATES OF AMERICA, *ss.:*

To Gregorio Araneta, acting attorney general for the Philippine Islands:

You are hereby cited and admonished to be in and appear at the Supreme Court of the United States, to be holden at Washington, within sixty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the supreme court of the Philippine Islands, wherein Timoteo Natividad is plaintiff in error and The United States is defendant in error to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of February in the year of our Lord, 1904.

(S'g'd) VICTORINO MAPA,
Associate Justice of the Supreme Court of the Philippine Islands.

47 I have received a copy of the foregoing citation and accept service thereof as though regularly had and inasmuch as this writ of error is sued out in the case of The United States *vs.* Valentin Trono, Máximo Angeles and Timoteo Natividad I agree that the same return may be made to this writ of error as is made to the one already sued out in the same case by Valentin Trono, Máximo Angeles and that the two writs of error may be united in the same transcript as the same cause which, in effect, they are.

(Signed) GREGORIO ARANETA,
Acting Attorney General of the Philippine Islands.

(Endorsed:) Filed in the office of the clerk of the supreme court of the Philippine Islands this 16th day of February, 1904, at 10:55 a. m. J. E. Blanco, clerk, by (s'g'd) H. D. McGeorge, deputy.

That afterwards, to-wit, the 26th day of February, 1904, a stipulation was filed in the said cause, which stipulation is in the words and figures following, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,
versus
VALENTIN TRONO, MÁXIMO ANGELES, and TIMOTEO NATIVIDAD, Defendants and Appellants.

48 It is agreed by and between the plaintiffs in error and the defendants in error in the above entitled cause that it shall not be necessary to include the evidence in the return to the writ of error, the facts stated in the decisions of the court of first instance and the supreme court of the Philippine Islands being sufficient to a proper understanding of the assignments of errors.

Manila, P. I. February 23, 1904.

(Signed) GREGORIO ARANETA,
Acting Attorney General of the Philippine Islands.
(Signed) FELIX FERRER,
(Signed) W. A. KINCAID,
Attorneys for Plaintiffs in Error.

(Endorsed:) Filed in the office of the clerk of the supreme court of the Philippine Islands this 26th day of February, 1904, at 9:32 a. m. J. E. Blanco, clerk, by H. D. McGeorge, deputy.

49 Supreme Court of the United States.

VALENTIN TRONO ET AL., Plaintiffs in Error,
versus
THE UNITED STATES, Defendant in Error.

It is hereby agreed by and between Felix Ferrer and W. A. Kincaid, attorneys for the above mentioned plaintiffs in error and the acting attorney general of the Philippine Islands, that the translation of the record of the above entitled cause from Spanish to English is true and correct.

Manila, March 23rd, 1904.

(S'g'd) GREGORIO ARANETA,
Acting Attorney General, for Defendant in Error.
(S'g'd) FELIX FERRER,
" W. A. KINCAID,
Attorneys for Plaintiffs in Error.

50 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Philippine Islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the Philippine Islands, before you, or some of you, between The United States, plaintiff and appellee, and Valentin Trono, Maximo Angeles and Timoteo Natividad, defendants and appellants, a manifest error hath happened to the great damage of the said Valentin Trono and Maximo Angeles, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, *we* command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2 day of April
51 1904, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 2 day of February in the year of our Lord, 1904.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

The foregoing writ of error is allowed to operate as a supersedeas of the judgment complained of, and upon the execution of a bond by Maximo Angeles in the sum of ten thousand ($10,000.00) dollars, and by Valentin Trono in the sume of five thousand ($5,000.00) dollars, payable to the defendant in error, conditioned as required by law, to be approved by me, they shall respectively be entitled to their liberty pending such writ of error.

[Seal Corte Suprema, Islas Filipinas.]

VICTORINO MAPA,
Associate Justice of the Supreme Court of the Philippine Islands.

Filed in the clerk's office of the supreme court of the Philippine Islands this 2 day of February 1904 2 p. m.

J. E. BLANCO, *Clerk,*
By H. D. McGEORGE, *Deputy.*

52 THE UNITED STATES OF AMERICA, *ss:*

To Gregorio Araneta, acting attorney general for the Philippine Islands:

You are -by cited and admonished to be in and appear at the Supreme Court of the United States, to be holden at Washington, within sixty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the supreme court of the Philippine Islands, wherein Valentin Trono and Maximo Angeles, are plaintiffs in error and The United States is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy — should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2 day of February in the year of our Lord, 1904.

[Seal Corte Suprema, Islas Filipinas.]

VICTORINO MAPA,
Associate Justice of the Supreme Court of the Philippine Islands.

I admit the receipt of a copy of the above citation and accept service thereof as though regularly had this February 2, 1904.

GREGORIO ARANETA.

Hertida agria doy 3 de Febrero de 1904 por I. H. Degrino traneta Ramon Avancena.

Filed in the clerk's office of the supreme court of the Philippine Islands this 3rd day of February, 1904.

J. E. BLANCO, *Clerk.*

53 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Philippine Islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the Philippine Islands, before you, or some of you, between The United States, plaintiff and appellee, and Valentin Trono Maximo Angeles and Timoteo Natividad, defendants and appellants, a manifest error hath happened to the great damage of the said Timoteo Natividad as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in

this behalf, *we* command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with writ, so that you have the same at Washington on the second day of
54 April, 1904, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 15th day of February, in the year of our Lord, 1904.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

The foregoing writ of error is allowed to operate as a supersedeas of the judgment complained of and upon the execution of a bond by Timoteo Natividad in the sum of two thousand five hundred dollars (2,500.00) payable to the defendant in error conditioned as required by law, to be approved by me, he shall be entitled to his liberty pending such writ of error.

[Seal Corte Suprema, Islas Filipinas.]

VICTORINO MAPA,
Associate Justice of the Supreme Court of the Philippine Islands.

Filed in the office of the clerk of the supreme court of the Philippines this 15th day of Feb'y, 1904.

J. E. BLANCO, *Clerk.*

55 THE UNITED STATES OF AMERICA, *ss:*

To Gregorio Araneta, acting attorney general for the Philippine Islands:

You are hereby cited and admonished to be in and appear at the Supreme Court of the United States, to be holden at Washington, within sixty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the supreme court of the Philippine Islands, wherein Timoteo Natividad is plaintiff in error and The United States is defendant in error to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of February in the year of our Lord, 1904.

[Seal Corte Suprema, Islas Filipinas.]

VICTORINO MAPA,
Associate Justice of the Supreme Court of the Philippine Islands.

I have received a copy of the foregoing citation and ac-
56 cept service thereof as through regularly had, and in as much as this writ of error is sued out in the case of The United States *vs.* Valentin Trono, Maximo Angeles and Timoteo Natividad I agree that the same return may be made to this writ of error as is made to the one already sued out in the same case by Valentin Trono, Maximo Angeles and that the two writs of error may be united in the same transcript as the same cause which, in effect, they are.

GREGORIO ARANETA,
Acting Attorney General of the Philippine Islands.

Filed in the office of the clerk of the supreme court of the Philippine Islands this 16 day of Febrero, 1904, 10.55 a. m.

J. E. BLANCO, *Clerk*,
By H. D. McGEORGE, *Deputy*.

57 Supreme Court of the United States.

VALENTIN TRONO ET AL., Plaintiffs in Error,
versus
THE UNITED STATES, Defendant in Error.

It is hereby agreed by and between Felix Ferrer and W. A. Kincaid, attorneys for the above mentioned plaintiffs in error and the acting attorney general of the Philippine Islands, that the translation of the record of the above entitled cause from Spanish to English is true and correct.

Manila, March 23rd, 1904.

GREGORIO ARANETA,
Acting Attorney General, for Defendant in Error.

FELIX FERRER,
W. A. KINCAID,
Attorneys for Plaintiffs in Error.

58 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

In the Matter of the Petition of VALENTIN TRONO, MÁXIMO ANGELES, and TIMOTEO NATIVIDAD for a Writ of Error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands.

In obedience to the foregoing writ of error, I herewith transmit to the Supreme Court of the United States a true and complete transcript, in English, of the record and proceedings in the foregoing entitled cause, this 28th day of March, 1904.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

Endorsed on cover: File No. 19,370. Philippine Islands supreme court. Term No. 719. Valentin Trono, Maximo Angeles, and Timoteo Natividad, plaintiffs in error, vs. The United States. Filed May 24, 1904. File No. 19,370.

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 20 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 34.

VALENTIN TRONO, MÁXIMO ANGELES, AND TIMOTEO NATIVIDAD, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR PLAINTIFFS IN ERROR.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiffs in Error.

MAURICE KELLY,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 18668

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 34.

VALENTIN TRONO, MAXIMO ANGELES, AND TIMOTEO NATIVIDAD, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This case is brought here by writ of error to the Supreme Court of the Philippine Islands (Rec., 29, 30) to review the judgment of that court (Rec., 14) reversing the judgment of the Court of First Instance, Fifth Judicial District, Province of Bulacan (Rec., 2–4), and adjudging the defendants Trono and Angeles (plaintiffs in error here) guilty of the crime of homicide (*homicidio*), as principals, and the defendant (plaintiff in error) Natividad guilty, as accomplice, of the same crime of homicide, and condemning Trono and Angeles to imprisonment (*reclusión temporal*) for a period of fourteen years eight months and one day, and Natividad to imprisonment for eight years and one day (*prisión mayor*), and

all three to the payment of an indemnity of five hundred pesos to the heirs of *Benito Perez*, their alleged victim.

Trono, Angeles, and Natividad were held by the justice of the peace of Hagonoy, Province of Bulacan, for trial by the Court of First Instance, Province of Bulacan, for the murder of one Benito Perez, upon the complaint of Candelaria Santos (Rec., 2). The complaint (Rec., 1) is dated February 13, 1903, and is as follows:

> "The undersigned accuses Máximo Angeles, Timoteo Trinidad and Valentin Trono Felipe, inhabitants of this municipality, of the crime of murder committed as follows:
>
> "That the said defendants, in this municipality, on the 6th instant, with great cruelty and evident premeditation, caused the death of the son of the complainant, by name Benito Perez, inflicting upon him heavy and mortal blows all over the body and especially in the abdomen, by means of blows given with the butts of guns, they co-operating one with the other. This against the statute in the case made and provided.
>
> CANDELARIA SANTOS (x her mark)."

Upon this complaint the defendants, Trono, Angeles, and Natividad, were tried by the Court of First Instance, the trial beginning April 20, 1903, and on April 27, 1903, the trial court entered its decision and judgment (Rec., 2–4), in which, after reviewing the evidence, it was held (Rec., 3):

> "From the result of the testimony, it is to be inferred that, although it has been established that the accused are guilty of the assault which caused contusions of a slight character upon Benito Perez, because they arrested him and took him away for the purpose of beating him, still, the testimony does not show that the said contusions were the actual and proximate cause of the death of the said Benito, and in consequence it follows that the accused are not guilty of the crime of murder, much less of the commission of that crime with great cruelty and evident pre-

meditation, as no proof of these circumstances has been introduced.

"As the crime of assault (*lesiones menos graves*) is included in the crime of murder charged in the complaint and as the evidence shows that the defendants are guilty of the former crime, the defendant Valentin having availed himself of his public character as subinspector of the municipal police, and the crime having been committed at night, the court, applying section 29 of general order No. 58 and the articles of the Penal Code and other provisions of law applicable to the case, decides that he should convict, and does hereby convict Máximo Angeles, Valentin Trono and Timoteo Natividad as principals of the crime of assault (*lesiones menos graves*) and sentences them to suffer the penalty of six months' imprisonment, to the payment jointly and severally to the heirs of Benito Perez of the sum of one hundred pesos, Mexican currency, with subsidiary imprisonment, in case of insolvency, at the rate of one day for each twelve and one-half pesetas which they may fail to pay and to the payment of the costs of the prosecution.

"It is so ordered."

From this judgment, convicting them of the crime of assault (*lesiones menos graves*), the defendants appealed to the Supreme Court of the Philippine Islands (Rec., 4), and the cause having been heard decision therein was rendered January 19, 1904, Mr. Justice Mapa delivering the opinion of the court (Rec., 5–11). After reviewing the evidence the court concludes its opinion with the following decision (Rec., 11):

"We therefore reverse the judgment appealed from, and sentence the defendants Máximo Angeles and Valentin Trono to the penalty of fourteen years, eight months and one day of *reclusión temporal*, and Timoteo Natividad to the penalty of eight years and one day of *prisión mayor*, and all three to the payment of an indemnity consisting of five hundred pesos, Philip-

pine currency, to the heirs of the deceased, and to the payment of the costs in this instance.

"It is so ordered."

Thereupon the defendants petitioned for a rehearing (Rec., 12) upon the following grounds:

"1. The court erred in convicting Máximo Angeles and Valentin Trono of the crime of homicide after they were put in jeopardy in the Court of First Instance for the said crime and had been acquitted thereof after regular and final trial.

"2. The court erred in convicting Timoteo Natividad as an accomplice of the crime of homicide after he had been placed in jeopardy in the Court of First Instance for the said crime and acquitted thereof after a regular and final trial.

"3. The judgment of the Court of First Instance convicting the defendants and appellants upon a complaint charging the crime of murder, was an acquittal of the crime charged in the complaint as also of the crime of homicide, and of all crimes charged in the complaint higher in degree than the crime of assault, (*lesiones menos graves*).

"4. The decision of the court convicting the defendants Valentin Trono and Máximo Angeles of the crime of homicide is in violation of the act of Congress of the United States for the Philippines passed the first day of July, 1902, by which it is provided that 'no person for the same offense shall be twice put in jeopardy of punishment.'

"5. The judgment of the court condemning the defendant Timoteo Natividad as an accomplice of the crime of homicide is in violation of the law of the Congress of the United States for the Philippine Islands enacted by Congress the first day of July, 1902, by which it is provided that 'no person for the same offense shall be twice put in jeopardy of punishment.'

"6. The complaint, comprising as it does every crime of violence from murder to assault, the final judgment of the Court of First Instance put an end forever to all inquiry into these crimes, with the exception of the crime of assault (*lesiones menos graves*)

or crimes of less degree and the power of this court upon appeal was limited to affirming the judgment of the Court of First Instance convicting the accused and appellants for the crime of assault (*lesiones menos graves*) or to reverse the said decision, but this court was without power to reverse the said judgment and convict the defendants of the crime of homicide of which they were acquitted by the final judgment of the Court of First Instance."

Petition for rehearing was denied by the Supreme Court without opinion (Rec., 13), and on February 2, 1904, judgment was entered against the defendants as follows (Rec., 14):

"The court having acquired jurisdiction for the trial of the above-entitled cause which has been submitted by both parties for decision, and after consideration thereof by the court upon the record and its decision, an order for judgment having been filed the 19th day of January, 1904.

"By virtue of said order it is hereby decreed that the judgment of the Court of First Instance of Bulacan, dated the 27th day of April, 1903, and against which the above-mentioned appeal was taken, is reversed, and the defendants Máximo Angeles and Valentin Trono are condemned to the penalty, each one, of fourteen years, eight months and one day of *reclusión temporal* and Timoteo Natividad to the penalty of eight years and one day of *prisión mayor* and all three to the indemnification of five hundred Philippine pesos to the heirs of the deceased and to the payment of the costs of this instance.

"It is also ordered that the said cause be remanded to the said Court of First Instance for the corresponding effects."

To which judgment of the appellate court and the rulings upon which the same was predicated exceptions were duly taken by the defendants (Rec., 14, 15).

In due course writs of error were sued out (Rec., 29, 30), and the writ of error sued out separately by Timoteo Nativ-

idad was by consent included in the same transcript and return as that in favor of Trono and Angeles (Rec., 32).

ASSIGNMENT OF ERRORS.

I.

The court below erred in adjudging Valentin Trono and Máximo Angeles guilty, as principals, of the crime of homicide (*homicidio*) in the killing of Benito Perez, and in imposing sentence upon them under said judgment, the said Trono and Angeles having been theretofore arraigned and tried for, and duly acquitted of, the identical offense, act, and crime in a court of competent jurisdiction, *to wit*, the Court of First Instance of the province of Bulacan, upon a valid complaint and at the end of a regular and definite trial.

II.

The court erred in convicting the said Valentin Trono and Máximo Angeles, as principals, of the crime of homicide (*homicidio*) after their acquittal of the same crime and offense by a court of competent jurisdiction, contrary to the provisions of the fifth section of the act of Congress approved July 1, 1902, chapter 1369, which provides that "no person, "for the same offense, shall be twice put in jeopardy of pun-"ishment."

III.

The court erred in adjudging Timoteo Natividad guilty, as accomplice, of the crime of homicide (*homicidio*) in the killing of Benito Perez, and imposing sentence upon him under said judgment, the said Natividad having been theretofore arraigned and tried for, and duly acquitted of, the identical offense, act, and crime in a court of competent urisdiction, *to wit*, the Court of First Instance of the province

of Bulacan, upon a valid complaint and at the end of a regular and definite trial.

The court erred in convicting said Timoteo Natividad, as accomplice, of the crime of homicide (*homicidio*) after his acquittal of the same crime and offense by a court of competent jurisdiction, contrary to the provisions of the fifth section of the act of Congress approved July 1, 1902, chapter 1369, which provides that "no person, for the same offense, "shall be twice put in jeopardy of punishment."

ARGUMENT.

I.

In convicting Trono, Angeles, and Natividad of homicide, after their acquittal thereof by the Court of First Instance, the court below placed them for the same offense twice in jeopardy of punishment.

The question here presented is identical in the case of the three plaintiffs in error, *viz.*, whether or not the Supreme Court of the Philippine Islands in reversing on their appeal the judgment of the Court of First Instance and convicting them of the crime of homicide, of which they had been acquitted in the lower court, placed these plaintiffs in error twice in jeopardy of punishment for the same offense, and whether, if this was done, the court violated the provisions of the Philippine bill of rights in that regard.

The "Declaration of Rights" in the fifth section of the Philippine civil government act of July 1, 1902 (32 Stats., 691, 692), provides that "no person, for the same offense, shall be twice put in jeopardy of punishment."

As above stated, the plaintiffs in error were tried in the Court of First Instance, Province of Bulacan, on a complaint charging them with the murder of one Benito Perez. After a regular trial they were acquitted by the Court of First In-

stance of the charge of murder and were convicted of the offense of assault (*lesiones menos graves*), the court saying (Rec., p. 3):

> "the accused are not guilty of the crime of murder, much less of the commission of that crime with great cruelty and evident premeditation, as no proof of these circumstances had been introduced. The crime of assault (*lesiones menos graves*) is included in the crime of murder charged in the complaint, and the evidence shows that the defendants are guilty of the former crime."

On appeal the Supreme Court reversed the Court of First Instance, set aside the conviction of assault, and upon the same record, and without affording defendants opportunity of further trial, convicted Trono and Angeles as principals, and Natividad as accomplice, in the crime of homicide. In this, we submit, there was a plain violation of the fundamental guaranty of immunity from second jeopardy for the same offense.

In order to present the matter clearly to the court, it is necessary to briefly review the pertinent provisions of the penal statutes in force in the Philippine Islands.

The term "murder," charged in the complaint, is not used in the Penal Code of the Philippine Islands. Assuming that the word is used according to its meaning at the common law, we find that it embraces the statutory crimes of (1) parricide, (2) assassination, and (3) homicide. Article 402 of the Penal Code, title VIII, chapter I, defines the crime of parricide—the killing of ascendants or descendants, by blood or affinity—and its punishment. The crime of assassination (*asesinato*) is defined by the following article (Penal Code P. I., 83):

> "Art. 403. He who, without being included in the preceding article, shall kill any person, is guilty of assassination if the deed is attended by any of the following circumstances: (1) with treachery; (2) for

price or promise of reward; (3) by means of flood, fire or poison; (4) with deliberate premeditation; (5) with vindictiveness, by deliberately and inhumanly increasing the suffering of the person attacked.

"A person guilty of assassination shall be punished with the penalty of *cadena temporal* in the maximum degree to death."

From the foregoing definition it appears that in the statutory crime of assassination (*asesinato*) are embraced all offenses which would fall within the common-law definition of murder, except the killing of ascendants or descendants by blood or affinity, and excepting murders committed without deliberate premeditation.

The crime of homicide, of which plaintiffs in error stand convicted, is thus defined by article 404:

"Art. 404. He who, without being included in the provisions of article 402, shall kill another without the attendance of any of the circumstances specified in the foregoing article is guilty of homicide. A person guilty of homicide shall be punished with the penalty of *reclusión temporal*."

Homicide in the Philippine code includes, therefore, the crime of murder at the common law where the element of deliberation is absent as well as the common-law felony of manslaughter.

Chapter VII of title VIII (articles 414 to 422, inclusive), treats of "personal injuries inflicted by violence (*lesiones*)." The plaintiffs in error were convicted of the offense of *lesiones menos graves* under the provisions of article 418, which reads as follows:

"Art. 418. Injuries not included in the preceding articles, which shall render the injured person unable to work for eight days or more, or shall require the care of a physician for a similar period, shall be less grave, and shall be punished with *arresto mayor* or banishment, and a fine of from 325 to 3,250 pesetas, in the discretion of the courts.

"When the less grave injury should be inflicted with manifest intent of outrage or under humiliating circumstances, in addition to *arresto mayor*, a fine of from 325 to 3,250 pesetas shall be imposed."

Chapter I of Title II of the Penal Code—"those criminally responsible for crimes and misdemeanors"—contains the following provisions:

"Art. 12. The following are criminally liable for crimes:

"1. Principals.

"2. Accomplices.

"3. Accessories.

"The following are criminally liable for misdemeanors:

"1. Principals.

"2. Accomplices."

"Art. 13. The following are considered as principals:

"1. Those who take a direct part in the execution of the act.

"2. Those who directly force or induce others to execute it.

"3. Those who coöpperate in the execution of the act by another act without which it could not have been accomplished.

"Art. 14. Accomplices are those persons who, not being included in art. 13, coöperate in the execution of the act by other previous or simultaneous acts."

By section 29 of General Order No. 58 of the military governor of the Philippine islands, amending the Code of Criminal Procedure, and promulgated April 23, 1900, it is provided that:

"The court may find the defendant guilty of any offense, or of any frustrated or attempted offense, the commission of which is necessarily included in the charge in the complaint or information."

Examination of articles 402, 403, and 404 of the Penal Code, *supra*, shows that the crimes of parricide, assassina-

tion, and homicide all fall within the definition of murder as given in the common law and in all criminal statutes of the several States of this Union.

Under a complaint or information charging murder conviction may be had of the crime of homicide. This has been specifically ruled by the Supreme Court of the Philippine islands in the case of *United States vs. Yacat*, 1 Philip. 443, the court saying (p. 445):

> "If the crime of homicide is included in that of murder because homicide qualified by certain specific circumstances constitutes murder, it is unquestionable that upon an information for murder the courts can convict the defendants, as in this case, of the crime of homicide, under section 29 of general orders, No. 58. It is not necessary that a new information be filed charging the latter offense."

Under the construction placed by the Court of First Instance on section 29 of general orders No. 58, *supra*, it would seem that a conviction of assault (*lesiones menos graves*) may be had under a complaint charging murder. Whether this construction be correct or not, does not here concern us. It is sufficient for the purposes of this case that in being arraigned and tried under a complaint charging murder the plaintiffs in error were liable to conviction for the crime of homicide. There was a specific finding by the Court of First Instance that the accused were not guilty of the crime of "murder," which is equivalent to a specific finding that they were not guilty of the crime of homicide. Apart from this, the finding of the trial court convicting them of assault (*lesiones menos graves*) of necessity operated to clear them of any alleged offense arising from the same act of greater degree than assault. And this must necessarily be so whether the Court of First Instance was correct in holding assault to be a lesser grade of the offense of murder or not. If the plaintiffs in error could not properly have been convicted of assault under the complaint charging mur-

der, they could possibly be again tried for assault without being placed twice in jeopardy of punishment. But the charge of homicide being included in the charge of murder, there can be no question but that the defendants, being acquitted thereof by the trial court, and having been once in jeopardy of punishment for the crime of homicide could never again be placed on trial for the latter crime, based upon the same act, without being placed twice in jeopardy of punishment for the same offense.

While, curiously enough, neither the opinion (Rec., 5–11) nor the judgment (Rec., 14) of the Supreme Court anywhere state the crime of which the defendants are adjudged guilty, it is inferentially certain that the conviction was of homicide, since in the opinion (Rec., 11) the court state that they are convinced that there was no deliberation, and also because the punishment imposed (*reclusión temporal*) is less than the minimum sentence for assasination (*cadena temporal.*)

After this cause was brought up on writ of error, this court in the case of *Kepner vs. United States*, 195 U. S., 100, held that the action of a Court of First Instance in acquitting the defendant in a criminal cause was final and could not be reviewed in the appellate court. The facts of that case are thus stated in the opinion (p. 110):

> "Thomas E. Kepner, a practicing lawyer in the city of Manila, Philippine Islands, was charged with a violation of the law in the embezzlement of the funds of his client (*estafa*). Upon trial, in November, 1901, in the Court of First Instance, without a jury, he was acquitted, it being the judgment of the court that he was not guilty of the offense charged. Upon appellate proceedings by the United States to the Supreme Court of the Philippines Islands the judgment of the Court of First Instance finding the accused not guilty, was reversed, and Kepner was found guilty and sentenced to a term of imprisonment of one year eight months and twenty-one days, suspended from any

public office or place of trust and deprived of the right of suffrage.

"Error was assigned in the appellate court upon the ground that the accused had been put in jeopardy a second time by the appellate proceedings, in violation of the law against putting a person twice in jeopardy for the same offense, and contrary to the Constitution of the United States."

It was contended by the Government, and forcibly argued by Mr. Solicitor General at this bar, that under the system of jurisprudence in force in the Philippine Islands at the time of their acquisition by the United States, and since continued, the action of the lower courts in cases of felony was necessarily reviewed by the Audencia or Supreme Court, whether acquittal or conviction resulted below, "and the case was not final, the trial ended, and the jeopardy complete until the Audencia had pronounced judgment."

This court, however, reversed the court below, holding that the acquittal of the defendant by the Court of First Instance was final and not subject to review on appeal, since further proceedings in the appellate court would place the accused twice in jeopardy of punishment for the same offense, in violation of the provisions of the fifth section of the act of July 1, 1902, *supra*.

After reviewing the criminal jurisprudence of the Philippines as it stood at the date of their acquisition, Mr. Justice Day, delivering the opinion of the court, said (p. 121):

"Under that system of law it seems that a person was not regarded as being in jeopardy in the legal sense until there had been a final judgment in the court of last resort. The lower courts were deemed examining courts, having preliminary jurisdiction, and the accused was not finally convicted or acquitted until the case had been passed upon in the Audencia, or Supreme Court, whose judgment was subject to review in the Supreme Court at Madrid for errors of law, with power to grant a new trial. The trial was regarded as one continuous proceeding, and the pro-

tection given was against a second conviction after this final trial had been concluded in due form of law. The change introduced under military order No. 58, as amended by act 194 of the commission, made the judgment of the Court of First Instance final, in cases other than capital, whether the accused be convicted or acquitted unless an appeal was prosecuted by the Government or the accused in the manner pointed out.

* * * * * * *

(P. 128:) "It is true that some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him, certainly so after acquital (*Coleman v. Tennessee*, 97 U. S., 509). Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial for the same offense, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit (*People v. Miner*, 144 Illinois, 308; *State v. Bowen*, 45 Minnesota, 145; *State v. Layne*, 96 *Tennessee*, 668)."

Mr. Justice Day then quotes from *United States vs. Ball*, 163 U. S., 662, to the effect that "as to the defendant who "had been acquitted by the verdict duly returned and re- "ceived the court could take no other action than to order "his discharge. The verdict of acquittal was final, and "could not be reviewed, on error or otherwise, without put- "ting him twice in jeopardy, and thereby violating the Con-

"stitution. However it may be in England, in this country "a verdict of acquittal, although not followed by any judg- "ment, is a bar to a subsequent prosecution for the same "offense."

Mr. Justice Day then adds (p. 130):

> "It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense.
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> * * * * * * *
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> (P. 133:) "The *Ball* case, 163 U. S., *supra*, establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government. The Court of First Instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an Appellate Court, is to put him a second time in jeopardy for the same offense, if Congress used the terms as construed by this court in passing upon their meaning. We have no doubt that Congress must be held to have intended to have used these words in the well-settled sense as declared and settled by the decisions of this court."

Since the decision of this court in the Kepner case, therefore, it is established that jeopardy terminates with an acquittal by the trial court, and no further proceedings may be had in the appellate tribunal without placing the accused under a second jeopardy. This principle is now settled law and as such incorporated into the criminal jurisprudence of the Philippine Islands. It follows, therefore, that when the plaintiffs in error in this case were acquitted by the Court of First Instance of the charge of homicide their jeopardy was

ended, and they could not again be tried for that offense without being put twice in jeopardy therefor.

II.

By appeal from the conviction of assault the accused did not waive their immunity from second jeopardy on the charge of homicide.

The only theory upon which it can be argued that the conviction of the plaintiffs in error of the crime of homicide by the Supreme Court of the Philippine Islands, after their acquittal thereof by the Court of First Instance, did not violate the provision of section 5 of the act of July 1, 1902, *supra*, that "no person, for the same offense, shall be twice put in "jeopardy of punishment," is that by their appeal to the Supreme Court from the judgment of the trial court convicting them of assault these plaintiffs in error waived the immunity from second jeopardy guaranteed them by the statute.

In order to determine whether such appeal constitutes a waiver of this guaranty of immunity from second jeopardy it is necessary to consider the intent and meaning of Congress in enacting this provision of the declaration of rights. As said in *Kepner vs. United States, supra:* "In order to deter- "mine what Congress meant in the language used in the act "under consideration, 'No person, for the same offense, shall "'be twice put in jeopardy of punishment,' we must look to "the origin and source of the expression, and the judicial "construction put upon it before the enactment in question "was passed. * * * In ascertaining the meaning of the "phrase taken from the bill of rights, it must be considered "with reference to the common law from which it was taken "(1 *Kent Com.*, 336; *United States v. Wong Kim Ark*, 169 U. S., "649)."

The precise question whether a party convicted of a lesser offense under an indictment charging a greater waives his

immunity from prosecution for the greater offense upon new trial resulting from his appeal or motion for new trial has never been passed upon by the Federal courts, so far as we are able to ascertain, except in the case of *Harding vs. United States*, 1 Wall. Jr., 127; Fed. Case No. 15301, in which Mr. Justice Greer, in stating that a new trial would be granted, warned the defendants that if they accepted a new trial they could again be tried upon the whole indictment, including the charge of the higher offense of which they had been acquitted. On the authority of this court, however, as expressed in the cases of *Hopt vs. Utah*, 110 U. S., 574, and *Thompson vs. Utah*, 170 U. S., 343, it would seem plain that there can be no such waiver.

In the Hopt case the question presented was whether the absence of the accused during the trial by triers appointed by the court of challenges of proposed jurors in a case of felony, in violation of the Utah statute, could be waived by the failure of the accused to object and valid conviction had. In holding that no waiver, express or implied, could be made by the accused of this statutory provision this court, by Mr. Justice Harlan, said (p. 579):

> "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority' (1 Bl. Com., 133). The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the

deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind (4 Bl. Com., II). Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.

"For these reasons we are of opinion that it was error, which vitiated the verdict and judgment, to permit the trial of the challenges to take place in the absence of the accused."

In *Thompson vs. Utah*, 170 U. S., 343, the question was whether the accused, by failing to object until after verdict, could waive the right to be tried by a jury composed of twelve persons, guaranteed him by the Constitution of the United States. On this point this court, by Mr. Justice Harlan, held (p. 353):

"It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force, when this crime was committed, did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons."

And after citing the case of *Hopt vs. Utah, supra*, the opinion concludes (p. 354):

> "If one under trial for a felony the punishment of which is confinement in a penitentiary could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt."

If, then, it is not within the power of the accused to waive the requirement of statutory law that he be present at all stages of the trial or the guarantee of the bill of rights of trial by a jury of twelve, more certain is it that he cannot waive, either expressly or by implication, the fundamental provision of all enlightened jurisprudence of immunity from second jeopardy for the same offense. If a defendant cannot waive his right to a trial by twelve jurors, and if his absence during a stage of the trial cannot be cured by consent because of the interest which the public has in his life and liberty, it is manifest that he cannot, by his act of appeal, again place himself in that jeopardy of death from which he has once escaped by acquittal. This is clearly indicated in the dissenting opinion delivered by Mr. Justice Holmes in the Kepner case, thus:

> "It cannot matter that the prisoner procures the second trial. In a capital case, like *Hopt vs. People*, a man cannot waive, and certainly will not be taken to waive, without meaning it, fundamental constitutional rights (*Thompson vs. Utah*, 170 U. S., 343, 353, 354). Usually no such waiver is expressed or thought of. *Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.*"

Interpreting this provision, engrafted from the common law, in the light of the common law, we find that in prac-

tically all those jurisdictions where the common law prevails it has been uniformly held that the accused cannot waive his immunity from second jeopardy of punishment for the greater felony by appeal from conviction of a lesser. The question has been raised in many States where the common law prevails, and, we believe, has always been answered in the negative, except in the States of Ohio and South Carolina.

In *People vs. Dowling*, 84 N. Y., 478, the court thus states the rule (p. 483):

> "The reversal of the conviction does not disturb the verdict of acquittal. It is like a case of several defendants, some of whom are acquitted and some found guilty on the trial. The court may grant a new trial as to those convicted, without being forced to set aside the entire verdict."
>
> "The matter at the bottom is the constitutional provision that 'no person shall be subject to be twice put in jeopardy for the same offense' (Const. of N. Y., art. 1, sec. 6), and yet new trials are granted in criminal cases on the motion of the accused, and if he gets a new trial he is thus subject to be twice put in jeopardy. This is done on the ground, that by asking for a correction of errors made on the first trial, he does waive his constitutional protection, and does himself ask for a new trial, though it bring him twice in jeopardy. But that waiver, unless it be expressly of the benefit of the verdict of acquittal, goes no further than the accused himself extends it. *His application for a correction of the verdict is not to be taken as more extensive than his needs. He asks a correction of so much of the judgment as convicted him of guilt. He is not supposed to ask correction or reversal of so much of it as acquitted him of offense.* He, therefore, waives his privilege as to one, and keeps it as to the other. It is upon this principle, that where, by a verdict of guilty on one count or of one offense, and an acquittal on or for another, there has been a partial conviction on an indictment, and on writ of error there has been a reversal of the conviction, the acquittal still stands good, and is, as to that count or offense, a bar. As to that,

the plea of *autrefois acquit* can be upheld, though the plea of *autrefois convict* cannot be upheld as to the offense of which he was guilty. The waiver is construed to extend only to the precise thing concerning which the relief is sought."

See also—

Guenther vs. People, 24 N. Y., 100.
People vs. Cignarale, 110 N. Y., 23, 30.

And again, in *Stuart vs. Commonwelth*, 28 Gratt., 950, the Supreme Court of Virginia said (p. 953):

> "It is well-settled law in this State, that where there are several counts in an indictment, and the jury find the accused guilty upon one of the counts, saying nothing as to the others, the verdict acts as an acquittal upon the counts of which the verdict takes no notice, and the court should enter a judgment accordingly. *Lithgow v. Com.*, 2 Va. Cases, 297; *Page v. Com.*, 9 Leigh, 683; *Canada's Case*, 22 Gratt., 899; *Page's Case*, 26 Gratt., 943.
>
> "It may be regarded as equally well settled, that in such case if the accused applies for and obtains a new trial he does not thereby waive the advantage of the acquittal thus obtained. But he must be tried, and can only be tried again on the count on which he was convicted, and not on the counts of which he has been before acquitted. The reason is, that the accused having been rightfully acquitted of one or more of several offenses which have been joined in the said indictment, he cannot again be brought into jeopardy for these alleged offenses because having been wrongfully convicted on another he seeks and obtains redress against the wrong done him."

In *State vs. Martin*, 30 Wis., 216, the defendant had been indicted for murder. On trial, a verdict was returned "not guilty of murder, but guilty of manslaughter in the second degree." Motion for new trial was granted, and defendant was again tried for murder on the whole indictment. He

was found guilty of murder in the first degree. The Supreme Court of Wisconsin reversed the trial court, saying (p. 219):

> "A person already convicted may waive the constitutional protection against a second prosecution, and ask for a new trial to relieve himself from the jeopardy he is in. And when he does so, what ought to be considered the extent of his application? Is it to expose himself to the possible conviction of a charge of which he has been acquitted, or is it to relieve himself of the one of which he has been convicted? *It would seem that a bare statement of the proposition was sufficient to furnish the proper answer. It is not within the principles of human conduct for a person to ask a further trial of a charge of which he has already been found guiltless by a verdict of a jury.* But he seeks deliverance from one of which he has been convicted, and hence he asks that he may again be put upon trial for this charge. In this case the defendant was expressly acquitted of the charge of murder upon the first trial, and convicted of a lower crime. He asked for and obtained a new trial. A new trial of what? Of the charge of which he had been convicted, or the one of which he had been acquitted? *Is it reasonable to suppose that the defendant asked for another trial in order to determine whether he had committed the crime of murder, or was it merely to determine whether he was guilty of manslaughter in the second degree of which he stood convicted?* The answer would seem to be plain upon the principle that it was the latter charge *alone* that he asked to have retried, and his application for a new trial should be held to apply to this, and not to the higher crime of which he was acquitted. And this is in accordance with the great weight of judicial opinion upon this subject."

See also—

State vs. Hills, 30 Wis., 416.
State vs. Belden, 33 Wis., 120.

In the early case of *Campbell vs. State*, 9 Yerg., 333, it was urged by the prosecution that the defendant, in moving for

a new trial on one count of an indictment charging larceny had waived the benefit of his acquittal on the other counts of the same indictment. Answering this in the negative, the Supreme Court of Tennessee said (p. 386):

> "It is not necessary to determine how far a party could be held, even to an express waiver of the benefit of a verdict of acquittal. It is enough that in this case he has not done so. He moved for a new trial. *We are not to suppose his application was more extensive than his necessities.*"

And again in the case of *Slaughter vs. State*, 6 Humph., 410, the same court said (p. 415):

> "The order granting a new trial may have had the effect of setting aside the entire verdict, but as the verdict of acquittal of the murder protected the defendant, by the Constitution, from any subsequent trial for that offense, the court, at the subsequent trial, having the whole record before him, was bound to see that he was protected, and to regard so much of the order setting aside the verdict as a nullity, and so to try him for manslaughter only."

In *Brennan vs. People*, 15 Ill., 511, the several defendants were tried on an indictment for murder, and one of them, Ryan, was found guilty of manslaughter. A new trial was granted and Ryan was again tried for murder and convicted. On error the Supreme Court of Illinois reversed the judgment as to Ryan, saying (p. 517):

> "An indictment for murder embraces the charge of manslaughter. The lesser is included in the greater accusation. On such an indictment, the jury may find the prisoner guilty of manslaughter. And such a finding amounts to an acquittal of the charge of murder. The finding of the inferior is necessarily a discharge of the superior offense. Ryan was regularly put upon his trial on the indictment and was found guilty of manslaughter. In contemplation of law, the jury rendered two verdicts as to him; one ac-

quitting him of the murder of Story; the other convicting him of the manslaughter of Story. It is perfectly clear that he could not again be put in jeopardy on the same charge, unless that acquittal was set aside at his instance. A verdict either of acquittal or conviction is a bar to a subsequent prosecution for the same offense, although no judgment had been entered upon it. It does not appear from the record, that Ryan has waived the benefit of the verdict of acquittal. It is true that he united with the other prisoners in asking for a new trial, but that application as to him must be regarded as extending only to the charge upon which he was convicted. He had no occasion for another trial, except as to the charge of manslaughter. Being legally acquitted of the charge of murder, he surely did not desire to be again investigated. It is not to be presumed that he would voluntarily place himself in peril upon a charge, on which he had already been tried and acquitted."

See also—

Barnett vs. People, 54 Ill., 325, 331.

Sipple vs. People, 10 Bradwell, 144, 147.

In *Hurt vs. State*, 25 Miss., 378, the defendant was indicted and tried for murder. He was found by the jury guilty of manslaughter in the third degree. On writ of error the High Court of Errors and Appeals of Mississippi held that the verdict of manslaughter was a complete acquittal of all higher crimes of which the party might have been convicted, and that he did not and could not waive the immunity resulting therefrom, saying (p. 382):

"We hold that the sentence of the court upon the verdict of manslaughter was of itself a complete acquittal of all higher crimes of which the party might have been convicted under the indictment. It will not do to say that the reversal of the sentence against the party also destroyed the verdict and judgment by operation of law in his favor. The former being against the party could be made the subject of revision upon a writ of error to this court. *The latter, being*

in the party's favor, was final, conclusive and irreversible. Neither he nor the State could ask a revision of such judgment upon a writ of error to this court."

See also—

Morris vs. State, 8 S. and M. (Miss.) 762.

And in *Johnson vs. State*, 29 Ark., 31, the Supreme Court of Arkansas said (p. 45):

> "It is our opinion, upon principle and the great current of adjudications, that the verdict of murder in the second degree, rendered by the jury on the first trial, was equivalent to an acquittal of the appellant of murder in the first degree and a bar to a second trial for that grade of offense."

In *State vs. Tweedy*, 11 Iowa, 350, the defendant was indicted and tried for murder in the second degree. He was found guilty of manslaughter. On appeal the judgment was reversed and the cause remanded for a new trial. On the second trial defendant was again tried for murder. The case again coming before the Supreme Court, it was held that the conviction of manslaughter on the first trial was a bar to a subsequent trial for murder, which was not waived by the accused in application for new trial, the court saying (p. 354):

> "When the prisoner moved for a new trial and appealed to this court, he sought to be relieved of a judgment against him of manslaughter. He had no complaint to make that the jury had not convicted him of the offence of murder. If, however, he might properly be subjected to a second trial for murder, then he is compelled to submit to a verdict which he may deem ever so erroneous, lest by disturbing it, when insisting on his legal rights, he may place himself again in jeopardy."

In *State vs. Ross*, 29 Mo., 32, the defendant was indicted for murder in first degree, and was found guilty of murder

in the second degree. Upon appeal judgment was reversed. On second trial defendant pleaded former implied acquittal as bar. The State demurred; demurrer was sustained, and the defendant put on trial upon the whole indictment. Upon appeal the Supreme Court of Missouri, in reversing judgment and remanding the case, after reviewing the authorities, said (p. 48):

> "Our conclusion, then, on this point, is that the effect of the first verdict being an acquittal of the appellant of murder in the first degree he could not legally have been put upon his trial again on that charge upon the reversal of the judgment, and all the instructions given upon the hypothesis of murder in the first degree, of course, were improper."

And, again, in *State vs. Kattleman*, 35 Mo., 105, the court, citing *State vs. Ross, supra*, said (p. 106):

> "Kattleman was indicted for forgery; there were five counts in the indictment; he was tried on the whole indictment and found guilty on the first count. This verdict was set aside and a new trial awarded him. At the second trial he was again tried on the whole indictment and found guilty on the first count, and also on the third count. This was error. The verdict on the first trial was an acquittal on all but the first count, and he should have been tried again upon that alone."

In *Johnson vs. State*, 27 Fla., 245; 9 So. Rep., 208, defendant was indicted for murder in the first degree and was found guilty of murder in the second degree. Verdict was set aside and new trial granted on defendant's motion. The second trial was had on the whole indictment, and defendant was convicted of murder in the first degree. In reversing the judgment below and directing new trial upon the charge of murder in the second degree the Supreme Court of Florida said (p. 299):

> "While there are some authorities holding a different view, the preponderant current of the decisions

> maintains that a conviction for the lesser grade of offense is an acquittal of all grades above it in degree, included in the same indictment, though there is no express declaration of such acquittal in the verdict; and that upon a new trial, obtained at the convict's request, he cannot be again put in jeopardy for any grade of offense higher in degree than that of which he was at first convicted. We think the latter the correct view and the rule which must prevail here."

And again in *Golding vs. State*, 12 So. Rep., 525; 31 Fla., 262, the same court said (p. 264):

> "The conviction of the accused of murder in the second degree on the first trial had the effect in law to acquit him of the higher degree of the offense charged in the indictment, and he could not legally again be put upon trial for murder in the first degree. The court has settled this point in the case of *Johnson vs. State*, 27 Fla., 245, and it is not necessary to go over the discussion again."

In *Dennison vs. State*, 31 La. Ann., 847, the defendant was indicted for murder and convicted of manslaughter. From this conviction defendant appealed, and on appeal new trial was granted. On the second trial defendant was again arraigned for murder. He filed a plea of *autrefois acquit*, which was overruled by the trial court. On appeal the Supreme Court of Louisiana held that the overruling of the plea of *autrefois acquit* was error, saying (p. 848):

> "The effect of the verdict and sentence, as far as the prisoner was concerned, was to acquit him of the charge of murder and this effect was removed beyond the control of the State, and if the verdict had stood unquestioned by the action of the accused, it would have furnished an effectual bar to a further prosecution for murder. This being unquestionably true, the obtention by the accused of a new trial, as to the verdict of manslaughter, cannot be considered as a waiver of the right to the plea of *autrefois acquit quoad* the charge of murder. 'The waiving,' says Bishop,

'of a constitutional right, implied by the making of an application for a new trial, is not construed to extend beyond the precise thing concerning which the relief is sought. If, therefore, the verdict find the prisoner guilty of manslaughter and not guilty of murder, and a new trial is granted him, he cannot be convicted on the second trial of the matter of which he was acquitted on the first' (Bishop, Criminal Law, sec. 849).

"This being the case, there was error in ruling the prisoner to trial on the charge of murder, and, although he was only convicted of manslaughter, the erroneous ruling may have been seriously to his prejudice."

In *State vs. Murphy*, 13 Wash., 229; 43 Pac. Rep., 44, defendant was charged with murder in the first degree. A trial was had which resulted in verdict of murder in the second degree. On appeal the judgment was reversed and the cause remanded for a new trial. When the cause was again called for trial defendant interposed a plea of former acquittal of murder in the first degree. This plea was overruled and defendant was again put on trial for murder in the first degree. The case coming again before the Supreme Court of Washington, it was there held that the court below erred in overruling the plea of *autrefois acquit*, saying (p. 45):

"In principle, the decision must depend upon the nature of an information for murder in the first degree, and a verdict rendered thereon in its relation to the lower grades of felonious homicide. That a verdict of guilty of murder in the second degree or manslaughter may be 'properly rendered against a defendant charged with murder in the first degree is universally conceded.' If this is so, it must be for the reason that an information charging murder in the first degree also charges murder in the second degree and manslaughter, since it is familiar law that a person cannot be convicted of a crime without first having been charged therewith by indictment or information. It is the duty of the court to see that

the verdict of the jury covers the subject-matter of the charge by finding the defendant either guilty or not guilty; and, since in every charge of murder in the first degree is included a charge of murder in the second degree and manslaughter, it is the duty of the court to see that a verdict of either guilty or not guilty is returned as to each of these charges. The practice of requiring a verdict which in form finds as to only one of such charges is so universal that it must be held to have been founded upon correct principles. It follows that the rendition of such single verdict is, in fact, the rendition of a verdict as to every grade of the offense included in the information; that, upon the charge of murder in the first degree, the rendition of such single verdict must, at least, include a verdict of guilty or not guilty as to murder in the first degree, murder in the second degree, and manslaughter. This can only be so upon the theory that a verdict of guilty as to any grade of the crime included in the information is a verdict of not guilty as to the higher grades, and of guilty not only of the grade mentioned in the verdict, but of every lower grade. The logical result of this course of reasoning, which seems necessary to sustain the practice as to receiving verdicts where the information charges a crime with lower grades, is that, for the purposes of such verdict, the defendant is upon trial upon a separate information for each of such grades. If this be so, reason will require that, in determining the result of any verdict, it should be in the light of the fact of such separate charges. A defendant upon trial for the crime of murder in the first degree could not be again put upon trial for that offense after a general verdict of not guilty; and, since the effect as to that grade of the crime of a verdict of guilty of a lower grade is the same as a verdict of not guilty, a verdict of guilty of the lower grade should protect from further prosecution for the higher grade.

"The respondent seems to rest its contention upon the claim that the verdict is entire, and relates to all grades of the crime, and, when vacated, has no longer force as to any grade. But the practice of allowing such verdicts is better sustained upon the theory that

the verdicts as to all of the grades are several; and if they are, there seems to be no ground upon which the contention of the appellant can be successfully met. The question has been so often discussed in all its bearings that it is not necessary for us to say more than that the cases which have held as contended by the appellant are so fully sustained upon reason that, even if the authorities were equally divided, we should be inclined to sustain such contention; and, in view of the fact that such an overwhelming weight of authority is upon that side, our duty is clear. This question has been heretofore substantially determined by this court. The directions as to the disposition to be made in the Superior Court of the cases of *State vs. Freidrich*, 4 Wash., 204; 29 Pac., 1055; 30 Pac., 328, and 31 Pac., 332, and *State vs. Robinson* (decided July 17, 1895), 41 Pac., 51, could only have been properly given upon the theory that a verdict of guilty of murder in the second degree was also, in legal effect, a separate verdict of not guilty of murder in the first degree and of guilty of manslaughter."

In *Bell vs. State*, 48 Ala., 684, the defendants were indicted on several counts, one of which charged them with burglary the others with grand larceny. The jury returned a verdict of "guilty of burglary." Judgment entered on this verdict was reversed on defendants' appeal. On second trial defendants were tried on the counts charging grand larceny as well as on the count of burglary. To the larceny counts pleas of *autre fois acquit* were entered, but overruled by the trial court. The Supreme Court of Alabama reversed the court below on this ground, saying (p. 695):

"The legal effect of the verdict of acquittal of larceny, whether any judgment was rendered on it or not, was to put the alleged larceny as completely out of the indictment and case as if it had never been in the indictment or case. * * *

"The case when brought by the defendants to this court, at its June term, 1873, had by the aforesaid proceedings in the city court, become a case for burglary

only. This court was bound to treat it as such; and in reversing the judgment and sentence of the city court at the instance of the defendants, the Supreme Court had no jurisdiction to deprive them of the advantages which the law gave them as the result of the final verdict. The jurisdiction of this court in the case was appellate only. As the case, when brought here, had become one for burglary only, it remained a case for burglary only when remanded to the city court."

See also—

Berry vs. State, 65 Ala., 163.

In *Brown vs. United States*, 52 S. W. Rep., 56, the Supreme Court of Indian Territory thus states the rule (p. 58):

"The rule as we understand it, is that if an indictment contains more than one count, and different offences are set up in the different counts, then on conviction on one, and silence by the jury as to the other, the defendant stands acquitted on the counts not mentioned in the verdict, and as to those counts a plea of former jeopardy will be sustained, *even though on the motion of the defendant the verdict of guilty on the count upon which he was convicted be set aside and a new trial granted. In such case he can only be again put upon his trial on the count of the indictment upon which he has been convicted.* But when the different counts are simply variations in stating the same offense, then the granting of a new trial opens the whole case, and the defendant may be put upon his trial and convicted on any of the counts."

In *Jones vs. State*, 13 Tex., 168, the defendant, under indictment of murder in the first degree, was convicted of murder in the second degree. On defendant's motion a new trial was granted. He was again tried and was convicted of murder in the first degree. In reversing the court below the Supreme Court of Texas thus tersely states the principle

of former jeopardy and the impossibility of waiving the constitutional immunity (p. 185):

> "The finding of not guilty of the higher offense is, so far, a discharge of the prisoner, a discharge of the offense; and it would not be supposed for a moment that he would be dissatisfied or aggrieved thereby, and we have no authority for trying him again for the offense. If he should, under a hardly conceivable infatuation, ask for it, the courts would say 'You have been acquitted; we cannot try you again for that offense.' But for the offense of which he is found guilty he has a right to ask for a new trial. The courts, on a proper case, ought to grant it, and can try him again for the offense of which he had been convicted, but for no other."

In *State vs. Steeves*, 29 Or., 85; 43 Pac. Rep., 947, 953, the Supreme Court of Oregon held that on new trial the accused could not again be tried for murder of which he had been impliedly acquitted on the first trial by a verdict of manslaughter. This case, decided in 1896, so well states the doctrine prevailing in the several States that we quote the opinion of the court in full on this point. The court said (p. 953):

> "It is contended that, the defendant having been indicted for the crime of murder in the first degree, and being convicted of manslaughter only, the verdict of the jury though general in its terms, was an acquittal of the charges of murder in the first and second degrees, and that, in case the judgment rendered against him be reversed, he cannot be retried upon the charges of which he has been acquitted. Section 12 of article 1 of the constitution provides that 'no person shall be put in jeopardy twice for the same offense.' The defendant, having been arraigned, entered a plea of not guilty to the indictment, and the moment the jury was sworn to try him jeopardy attached, and, had the jury been discharged without his consent, except upon a failure to agree upon a verdict, he would stand acquitted before the law

(Conklin *vs.* State, 25 Neb., 794, 41 N. W., 788; Murphy *vs.* State, 25 Neb., 809, 41 N. W., 792; State *vs.* Shaffer, 23 Or., 555, 32 Pac., 545; State *vs.* Reinhart, 26 Or., 466, 38 Pac., 822). The defendant having, therefore, been put in jeopardy for the crime of murder in the first and second degree, his conviction for manslaughter, while unreversed, is a bar to another prosecution for all other degrees embraced within the indictment (Hill's Ann. Laws Or., sec. 1309)."

"It remains to be seen whether the granting of a new trial places the defendant *in statu quo*, and removes the bar created by the arraignment, plea and verdict. Mr. Van Fleet, in his excellent work on Former Adjudication (volume 2, par. 606) in discussing this question says: 'If one is tried upon an indictment which either expressly charges or impliedly includes different degrees of the same crime, it is held, as a common law question in Alabama, Arkansas, California, Florida, Georgia, Illinois, Iowa, Michigan, Mississippi, Texas and Wisconsin, that a conviction of one degree is an implied acquittal of all higher degrees, and bars their prosecution upon a new trial.' In Hurt *vs.* State, 59 Am. Dec., 225, Fisher, J., in speaking of the effect of a verdict of conviction of an inferior degree says: 'The jury in such case, in contemplation of law, render two verdicts, one acquitting the accused of the higher crime charged in the indictment, the other finding him guilty of an inferior crime. They must first determine his guilt or innocence upon the charge made by the indictment before proceeding to consider whether he is guilty of an inferior crime. The verdict of manslaughter is as much an acquittal of the charge of murder as a verdict pronouncing his entire innocence would be, for the effect of both is to exempt him from the penalty of the law for such crime.' The statute provides that: 'In all cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime.' Hill's Ann. Laws, Or. sec. 1383. The effect of this section is to regard each degree necessarily

embraced within the specifications of the charge as a separate indictment upon all of which the accused is tried at the same time, and the verdict of conviction upon an inferior degree operates as an acquittal of all the superior degrees necessarily included therein. In Indiana, Kansas and Kentucky statutes provide that 'the granting of a new trial places the parties in the same position as if no trial had been had,' and in those States it has been held that one who has been convicted of manslaughter upon an indictment that charges the crime of murder, and obtained a new trial, may be retried for the higher degree. *Ex parte* Bradley, 48 Ind., 548; Veatch *v.* State, 60 Ind., 291; State *v.* McCord, 8 Kan., 232; Com. *v.* Arnold, 83 Ky., 1. Prior to the amendment of the constitution of Missouri, the supreme court of that State uniformly held that when a new trial was granted to a person convicted of an inferior degree upon an indictment charging the commission of a crime in a superior degree he could not be retried for the higher degree. State *v.* Ross, 29 Mo., 32; State *v.* Kattleman, 35 Mo., 105; State *v.* Smith, 53 Mo., 129; State *v.* Brannon, 55 Mo., 63; State *v.* Bruffey, 75 Mo., 389. On November 30, 1875, that State adopted a new constitution which contained the provision (section 23, art. 2) that, 'if judgment on a verdict of guilty be reversed for error in law, nothing contained herein shall prevent a new trial of the prisoner on a proper indictment, or according to the correct principles of law.' In State *v.* Simms, 71 Mo., 538, it was held, that this provision overturned the rule announced in State *v.* Ross, *supra*, the court saying it was 'equivalent to declaring that, when such judgment is reversed for error at law, the trial had is to be regarded as a mistrial, and that the cause, when remanded, is to be tried anew, and is put on the same footing, as to a new trial, as if the cause had been submitted to a jury, resulting in a mistrial by the discharge of the jury in consequence of their inability to agree on a verdict.' Our statute prescribes that 'a new trial is a re-examination of an issue of fact in the same court after a trial and decision or verdict by a court or jury' (Hill's Ann. Laws, Or. sec. 234) but it is nowhere provided

that the granting of a new trial places the parties in the same position as if no trial had been had. 'One indicted for murder,' says Mr. Bishop in his work on Criminal Law (7th ed., vol 1, sec. 1056), 'and found guilty of manslaughter, is protected from any further prosecution for the murder.' And in the succeeding section the same learned author in discussing the effect of a conviction of a smaller grade included in an indictment charging a greater crime, says: 'Besides as a larger includes a smaller, it is impossible one should be convicted of the larger, without being also convicted of the smaller; and thus, if he has been found guilty or not guilty of the smaller, he is, when on trial for the larger, in jeopardy a second time for the same, namely, the smaller, offense. Some apparent authority, therefore, English and American, that a jeopardy for the less will not bar an indictment of the greater, must be deemed unsound in principle.' While there is some conflict of authority upon this subject, we believe that the great weight of it, as well as the better reason, supports the rule that a conviction of a lower degree, necessarily included within an indictment charging the commission of a greater crime, operates as an acquittal of all the degrees above it; and that a new trial, in the absence of a statute declaring the effect of a reversal of the judgment, must be confined to a retrial of the charge upon which the accused was convicted, or of a lower degree. The defendant, having been convicted of manslaughter, cannot, therefore, be tried for the commission of a greater crime."

And to the same effect see also:

People vs. Knapp, 26 Mich., 112, 113.
People vs. Comstock, 55 Mich., 405, 407.
George vs. State, 59 Neb., 163.
State vs. Kettle, 2 Tyler (Vt.), 472.

In Kentucky section 270 of the Code of Practice provides that:

"The granting of a new trial places the parties in the same position as if no trial had been had. All

the testimony must be produced anew, and the former verdict cannot be used or referred to in evidence or in argument."

A similar provision is contained in the Revised Statutes of Indiana, section 141, and also in section 274 of the Code of Kansas. On the strength of these statutes the courts of these States have held that where a new trial is granted the accused may be again tried for the greater offense of which he was acquitted on the first trial (*Commonwealth vs. Arnold*, 83 Ky., 1; *Morris vs. State*, 1 Blackford, 37; *Veatch vs. State*, 60 Ind., 291; *State vs. McCord*, 8 Kan., 232).

In California, however, a different interpretation has been placed upon a similar statutory provision, the Supreme Court of that State holding that, on new trial, the accused cannot again be prosecuted for any crime of which he was acquitted on the first trial without violating the provision of the State constitution (section 13 of article I), which declares that "no person shall be twice put in jeopardy for the same offense."

In *People vs. Gilmore*, 4 Cal., 376, the defendant was convicted of manslaughter upon indictment charging murder. On defendant's motion the verdict was set aside and he was again tried for murder. Plea of *autrefois acquit* was entered, and was overruled by the trial court. The case coming before the Supreme Court, it was held that the plea was good and should have been sustained, the court saying (p. 381):

"The 439th section of the Criminal Code reads as follows:

"'A new trial is a re-examination of the issue in the same court before another jury, after verdict has been given. It places the parties in the same position as if no trial had been had,' etc., etc.

"It is contended that this section is conclusive of the whole case. It is, however, susceptible of another reading; and one more in consonance with the humane and enlightened spirit of the age as well as of our jurisprudence.

"I understand it to mean the *issue in controversy*,

not the one that has been settled by the jury and found in favor of the defendant; and I understand the words 'placing the parties in the same position that they occupied before the trial,' as simply applying in reference to the issues undisposed of. The section, at best is but a crude definition of a new trial, and by reference to the act, it will be seen that the legislature does not purport to give to the courts the power of granting new trials, as a new and distinct power, not belonging to them by virtue of their original jurisdiction, but only to limit the exercise of an acknowledged authority.

"That I am correct in my construction of this section to my mind is evident from the fact that the legislature could not have intended where a man has been improperly convicted of a minor offense, to subject him to the risk of being convicted of a greater one. If such a rule be established, no man will subject himself to the risk of being hung for murder, when convicted of manslaughter, and will prefer in many instances, although innocent, to rest under the conviction than to encounter the danger of a second trial. In every case where the timid and unfriended are involved this will be found to be the result, and in times of high, popular excitement, those who may be bold in the consciousness of their innocence, will hesitate before they voluntarily assume so great a risk, or pay so fearful a premium for the privilege of asserting that innocence.

* * * * * * *

"It has been urged that the party voluntarily put himself in this jeopardy. Such is not the case. The act, if we are to give it the construction contended for on the part of the State, takes from the party a right which he before possessed, and necessarily subjects him to a second jeopardy if he wishes to maintain that right, or assert his innocence. This is a subjection by operation of law and not by act of the party; and if it were otherwise, I have shown that no party can voluntarily subject himself to a second trial after an acquittal, and that the courts have no jurisdiction over him."

And again, in *People vs. Gordon*, 99 Cal., 227; 33 Pac. Rep., 901, the Supreme Court of California held that a defendant indicted and tried for assault with intent to commit murder and convicted of assault with a deadly weapon could not on new trial be again tried for the greater offense, saying (p. 902):

> "It is contended, for respondent, that the instruction complained of was proper, for the reason that the former judgment was set aside, and a new trial granted, at the instance of appellant, and hence that he cannot claim protection under a law applicable to cases of 'former acquittal' and 'once in jeopardy;' and in support of this contention counsel cite *People v. Keefer*, 65 Cal., 232; 3 Pac. Rep., 818, and section 1180 of the Penal Code. The constitution, in section 13 of article I, declares that 'no person shall be twice put in jeopardy for the same offense,' and section 687 of the Penal Code provides that 'no person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted.' Section 1023 of the same Code also provides that 'when the defendant is * * * acquitted, or has been once placed in jeopardy upon an indictment or information, the * * * acquittal or jeopardy is a bar * * * for an offense necessarily included therein, of which he might have been convicted under that indictment or information.' Under these provisions, it must be held that, when a person is once placed upon his trial before a competent court and jury upon a valid indictment or information, the 'jeopardy' attaches, to which he cannot be again subjected, unless the jury be discharged from rendering a verdict by a legal necessity, or by his consent, or, in case a verdict is rendered, unless it be set aside at his instance.
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> * * * * * * *
>
> "Section 1180 of the Penal Code is as follows: 'The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in

argument, or be pleaded in bar of any conviction which might have been had under the indictment.' There can be no doubt that the granting of a new trial, upon the application of the accused, for an offense of which he has been convicted, places him in the same position as if no trial had been had; but if it was meant by the section quoted to go further, and provide that when the indictment charges two or more offenses, and on the first trial the accused is acquitted of one of the offenses charged, and convicted of another, the granting of a new trial of the offense of which he was convicted places him in the same position as to the offense of which he was acquitted as if no trial had been had, and thus subjects him to be tried again for the last-named offense, then the section is clearly in conflict with the provision of the constitution above quoted, and for that reason is void. (See *People vs. Gilmore*, 4 Cal., 376; *Cooley, Const. Lim.* (6th ed.), p. 401, and cases cited)."

In Georgia the original provision of the State constitution declared that "no person shall be put in jeopardy of life or liberty more than once for the same offense." The constitution of 1868 changed this provision by adding thereto the clause "save on his or her own motion for a new trial after conviction or in case of mistrial." The supreme court of Georgia, in *Waller vs. State*, 104 Ga., 505, 507, held that the constitution as thus changed permitted the prosecution of the accused on new trial on the whole indictment, notwithstanding his acquittal as to a part thereof on the first trial.

In Missouri the State constitution of 1875 changed the former provision with respect to jeopardy, and it is now held that the accused may be prosecuted on new trial for all the offenses charged in the indictment, although on first trial he was acquitted as to a part (*State vs. Sims*, 71 Mo., 538).

In the States of Ohio and South Carolina the courts hold that the defendant, in moving for a new trial, waives the constitutional guaranty of immunity from second jeopardy

for the same offense (*State vs. Behmer*, 20 Ohio St., 572; *State vs. Cross Roads Commissioners*, 3 Hill L., 239). The courts of these two States seem to stand alone in this construction.

Thus, from a review of the authorities, it appears that in the States of Alabama, Arkansas, California, Florida, Illinois, Iowa, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New York, Oregon, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin and in the Indian Territory the courts have held that there can be no waiver by the accused of his immunity from second jeopardy for the same offense, and that on new trial he can only be prosecuted for the crime of which he stood convicted. In the States of Kentucky, Indiana, and Kansas a different rule has been adopted, based on statutory provisions to the effect that "a new trial places the parties in the same position as if no trial had been had." The California courts, however, hold, on a similar statutory provision, that there can be no second prosecution for the offense of which the defendant was acquitted on first trial. In Georgia and Missouri the common-law rule has been changed by the constitution, and in Ohio and South Carolina the courts have adopted a different doctrine from that prevailing at the common law. Thus in the twenty-six jurisdictions in which the question has been raised the courts of nineteen States and the Indian Territory have held that there can be no waiver of the immunity from jeopardy of second punishment. In Ohio and South Carolina the courts have set aside the common-law rule. In the five remaining States the statutory or constitutional provisions have expressly changed the rule where new trial is granted on defendant's motion.

The English courts have gone so far in support of the maxim that no man ought to be twice brought in danger of his life for one and the same crime that they have always refused a new trial in cases of felony where the indictment is valid (*Rex vs. Mawbey*, 6 T. R., 619; *Regina vs. Bertrand*, L. R., 1 P. C., 520).

And in the earlier cases this was the construction of the courts in this country. In *United States vs. Gilbert*, 2 Sumn., 19; Fed. Case No. 15, 204, Mr. Justice Story said:

> "Upon the whole, having given this subject the fullest consideration, I am, upon the most mature deliberation, of opinion that this court does not possess the power to grant a new trial, in a case of a good indictment, after a trial by a competent and regular jury, whether there be a verdict of acquittal or conviction. My judgment is, that the words in the constitution, 'nor shall any person be subject for the same offense, to be twice put in jeopardy of life or limb' mean that no person shall be tried a second time for the same offense, where a verdict has already been given by a jury. The party tried is in a legal sense, as well as in common sense, in jeopardy of his life, when a lawful jury have once had charge of his offense as a capital offense upon a good indictment and have delivered themselves of the charge by a verdict. In this respect I follow the doctrine of the Supreme Court of New York; and the doctrine of the Supreme Court of Pennsylvania and North Carolina goes not only to the same extent, but includes cases where the party is once put upon his trial before the jury, and they are discharged from giving a verdict without extreme necessity. This too is the clear, determinate and well-settled doctrine of the common law, acting upon the same principle, as a fundamental rule of criminal jurisprudence."

See also—

People vs. Comstock, 8 Wend., 549.

In respect to immunity from second jeopardy of punishment, the law of the Philippine Islands is identical with that governing criminal prosecutions in the courts of the United States. In neither the Federal Statutes nor the Philippine penal laws is there any provision to the effect that new trial sets aside the former acquittal. Indeed, in the light of the decisions of this court in *Hopt vs. Utah* and *Thompson vs.*

Utah, it is manifest that any such provision would conflict with the jeopardy clause of the Bill of Rights.

Section 50 of General Order No. 58, *supra*, is as follows:

> "SEC. 50. It shall not be necessary to forward to the Supreme Court the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the sentence imposed does not exceed confinement in prison for one year, or a fine of 250 pesos, exclusive of costs, unless such case shall have been duly appealed. But such sentences shall be executed upon the order of the court in which the trial was had."

And section 4 of the act of the Philippine Commission, passed August 10, 1901 (No. 194), provides:

> "So much of section fifty of said General Order number fifty-eight as requires Courts of First Instance, or clerks thereof, to forward to the Supreme Court or the ministerio fiscal the record of all criminal cases for revision or consideration, except where the death penalty is imposed as the judgment or part of the judgment of such Court of First Instance, is hereby repealed, and it shall not be necessary to forward to the Supreme Court or the ministerio fiscal the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the penalty imposed is not death, unless such case shall have been duly appealed, as provided in such order. The records of all cases in which the death penalty shall have been imposed by any Court of First Instance, whether the defendant shall have appealed or not, shall be forwarded to the Supreme Court for investigation and judgment, as law and justice shall dictate."

Both by these amendments to the Philippine penal code and as a necessary consequence of the decision of this court in *Kepner vs. United States*, the judgment and sentence of the Court of First Instance was final in this case if the accused had not appealed. Is it reasonable, then, to suppose that an appeal would have been taken from the

conviction of *lesiones menos graves* and sentence of six months' imprisonment if these plaintiffs in error had believed that by so doing they would again put themselves in jeopardy of loss of life? As said by the Supreme Court of California in *People vs. Gilmore, supra*: "If such a rule be established, no man will subject himself to the risk of being hung for murder when convicted of manslaughter, and will prefer in many instances, although innocent, to rest under the conviction than to encounter the danger of a second trial."

If the doctrine of the court below be sustained, the same rule must necessarily be applied to the trial of criminal cases in the Federal courts. There is nothing in the state of the law in the Philippine Islands which would differentiate this case from a criminal cause in the courts of the United States, and if it be held that these plaintiffs in error have by their appeal waived immunity from second jeopardy for the offense of murder, it follows equally that every defendant in a Federal court renders himself liable to a second prosecution for crimes of which he has been acquitted, when he moves for new trial or sues out writ of error to correct a judgment convicting him of a lesser crime arising from the same act.

Not only has the court below reversed the judgment of acquittal, but it has gone a step further and, without even allowing a new trial, has tried and convicted the accused *on the appeal*. Thus merely on the transcript of the testimony, without confronting the witnesses, without opportunity of further questioning, and in the absence of the accused, the Supreme Court of the Philippine Islands has assumed to try and convict of this grave crime. A proceeding of this kind is violative of the fundamental concepts of right and justice on which our jurisprudence is founded. That a court should convict of grave crime on the testimony of witnesses whom it has not seen, without being able to judge by their demeanor of the truth or falsity of their statements, is utterly repugnant to our ideas of justice. Nor will it do to say that the absence of the jury trial changes this.

Whether the cause be tried by judge and jury, or by judge alone, matters not. In either case it is essential that they who find the fact of guilt or innocence shall hear and see the witnesses and be in position to further question them, if that be necessary, in the furtherance of justice. No conviction of guilt can be properly based upon a mere transcript of evidence, and it needs no argument to demonstrate that such procedure is fundamentally unjust.

Manifestly, the defendants below brought their appeal before the appellate court, with transcript of the record, for the purpose of submitting to the judgment of that court whether, upon such record, the trial court was justified in finding them guilty of the lesser offense of assault and rendering judgment accordingly. That was the measure of their need, and, as abundantly shown by the authorities, *supra*, that was the measure of their appeal. If the appellate court had, by such appeal, jurisdiction to hear and determine the guilt or innocence of these defendants below upon a higher and graver charge of which they had been acquitted in the trial court, it is manifest that the proceeding in the appellate court was, in legal effect, a new trial. When the appellate court set aside the judgment of the trial court, its functions as an appellate court ceased, and it then assumed to try the defendants *de novo* for the crime of murder. But manifestly no trial anywhere could thus occur, unless the court summoned the witnesses before it, judged of their demeanor and the truth or falsity of their statements, and also gave to these defendants in such proceeding the privilege guaranteed them by the Philippine Bill of Rights, which, in the substantial language of the VI amendment to the Federal Constitution, is:

> "to meet the witnesses face to face and to have com-
> "pulsory process to compel the attendance of witnesses
> "in his behalf" (32 Stats., 692).

Of course, in all American jurisprudence, such a proceeding in an appellate court would be impossible. It is just as

impossible here, since the safeguards guaranteed by the Philippine Bill of Rights, in language and effect, are precisely the same as those guaranteed by the Federal Constitution.

These guarantees, we submit, cannot have limited operation in the Philippines, when in letter and spirit they are the identical guarantees given by the Federal Constitution. Judicial interpretation and enforcement of these rights in Federal courts, we therefore submit, must be given the same meaning and application, in deference to the fundamental assurance which guarantees to all persons the equal protection of law.

For the reasons given, we respectfully submit that the judgment of the Supreme Court of the Philippine Islands should be reversed.

Respectfully submitted,

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MAURICE KELLY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 34.

JAN 15 1906

VALENTINE TRONO, MAXIMO ANGELES AND TIMOTEO NATIVIDAD, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

PETITION FOR REHEARING.

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vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

PETITION FOR REHEARING.

Rehearing herein is most respectfully prayed upon the following grounds:

The opinion declares the rule of law applicable in every Federal court within the entire national domain, mainland and islands, that

> "the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been."

And that by appeal from conviction of a lower offense (concededly within the higher crime charged) the accused

> "thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed."

I.

Section 726, U. S. Rev. Stat., chapter XII, entitled "Provisions common to more than one court or judge," provides:

> "All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law."

And the sole provision of Federal statute respecting the *effect* upon the former judgment of granting new trials is found in section 987 of chapter XVIII, entitled "Procedure" and relates solely to judgments entered by a circuit court *in civil cases*, when *"If a new trial be granted the "former judgment shall be thereby rendered void."*

Subsequent sections of the same chapter (*vide* 1014-1042) provide for "criminal procedure" in detail, *but* no provision is found therein declaring that in criminal trials a new trial shall render the former judgment void. But section 1035 expressly provides:

> "In all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged. *Provided* that such attempt be itself a separate offense."

This express provision declaring that in *civil* cases a new trial shall render the former judgment void, and the entire absence of any such provision in respect of criminal cases, especially in view of section 1035, just quoted, justifies application of the maxim *Expressio unius exclusio alterius.*

And the provisions of section 987, in declaring that in civil cases grant of new trial renders the former judgment void, was by no means surplusage, nor the mere statement

of an established general rule, for in many jurisdictions the trial or appellate court may limit the issue or issues to be thus retried or the parties defendant who shall be subject thereto.

Ency. Pleading & Practice, vol. 14, title "New Trial," foot page 996, citing thereunder decisions from some twelve different States.

Again section 722 of the same chapter XII, provides:

> "The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this title and of title 'Civil Rights' and of title 'Crimes,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

Treated then as matter of *practice,* it is obvious,

1. The Federal statute does *not* provide what effect shall follow reversal of judgment upon the appeal of the accused where acquitted of the graver and convicted of the lesser offense. Tested by ordinary rules the express provision in respect of *civil* cases, *supra,* and entire silence in respect of criminal cases would certainly demonstrate plain hiatus in this regard, and hence

2. This defect is supplied by adopting "the common law, as modified and changed by the constitution and statutes

of the State wherein the court having jurisdiction of such civil or criminal cause is held" not inconsistent with the Federal Constitution and laws.

Now in most of the States the law is construed by the highest court thereof as affording protection upon any new trial against the *graver* offense whereof the accused was acquitted on the former trial. The Federal Constitution is *not* inconsistent with such provision of State constitution or statute, because the former does not *per se* declare the rule now announced by this court. In the entire *silence* of Federal statute upon the subject is it not manifest that State constitutions and statutes (whose meaning and effect must be ascertained by adjudication of the State Supreme Court) are the controlling guide? We therefore most respectfully submit that in those jurisdictions where the law of the State *does* afford protection against second jeopardy on former acquittal of the graver offense, such established rule should control the Federal courts sitting therein. As the point is thus ruled in nearly all the States where the question has passed into judgment, it would seem to follow that the Federal courts therein should be bound thereby. Certainly in a case involving human liberty the question in this view should receive full argument.

II.

In New York the rule against such second jeopardy was expressly affirmed in *People vs. Dowling,* 84 N. Y., 478, nor do we understand it was changed even under express statute by the later case of *People vs. Palmer* (109 N. Y., 413). In the latter case the appellant contended (p. 415)

> "that as he was convicted of assault in the third de-
> "gree he was thereby acquitted of *assault in the*
> "*higher degrees,* and cannot be again tried under the
> "indictment, and that, upon the reversal of the judg-
> "ment of conviction, there was nothing left but a
> "charge of assault in the third degree, of which
> "charge the oyer and terminer had no jurisdiction."

The question raised is thus stated in the opinion of the court (p. 416):

> "The question brought before us by this appeal is whether, when the defendant, having been found guilty and sentenced for a lower *degree* of the crime charged in the indictment, has appealed to the Supreme Court upon exceptions, and has succeeded in reversing the judgment, and a new trial is ordered, and the cause remanded to the trial court for further proceedings, he can be tried again under the indictment without regard to the former trial and conviction."

The court, after citing the sections of the Code of Criminal Procedure relating to new trials to the effect that "the granting of a new trial places the parties in the same position as if no trial had been had," held that the second trial of Palmer for the first *degree* of assault did not violate the constitutional guaranty that "No person shall be subject to be twice put in jeopardy for the same *offense*" (Const. N. Y., art. 1, sec. 6). The court says (p. 419):

> "The effect of the defendant's appeal is merely to continue the trial under the indictment in the appellate court; and if the reversal of the judgment of conviction follows, that judgment, as well as the record of the former trial, have been annulled and expunged by the judgment of the appellate court, and they are as though the[y] never had been; while the indictment is left to [s]tand *as to the crime of which the prisoner had been charged and convicted*, as though there had been no trial."

The court, however, is careful to add (p. 420):

> "Only where the result of the former trial was, in effect, an acquittal of *another crime* charged in the indictment may he plead that result in bar of further prosecution for that crime."

The distinction is thus plainly drawn between different *offenses* and different *degrees* of the same offense. In the

Palmer case there was but one crime or offense charged in the indictment, viz., the crime of assault. By statute that offense has been divided into several *degrees*, the penalty to be inflicted being graduated by the circumstances surrounding the commission of the crime. The statute does not, however, create several distinct offenses or crimes of assault, and whether the verdict be guilty of assault in the first, second or third degree, the defendant stands equally convicted of the crime of assault. Hence a judgment of conviction of the crime in any degree is inseparable, and the judgment being set aside and new trial granted, on such second trial the accused must again stand for trial on the whole indictment.

The case is analogous to the practice in some States where it is left to the jury to fix, within certain limits, the penalty for the offense. Yet if the jury, convicting of murder, fixes the penalty at life imprisonment, on new trial the defendant may be sentenced to capital punishment.

This distinction between different *offenses* and different *degrees* of the same offense is clearly drawn by the Supreme Court of California. In the case of *People vs. Keefer*, 65 Cal., 232; 3 Pac. Rep., 818, defendant was tried on an indictment charging murder and found guilty of murder in the second degree; on new trial granted he was tried for murder in the first degree. On appeal the Supreme Court held that no error had thus been committed, saying:

> "The indictment charges the crime of *murder*, and the defendant was not acquitted of murder by the first verdict.
>
> "In dividing the crime of murder into two degrees the legislature recognized the fact that some murders, comprehended within the same general distinction, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine, in a particular case, whether the crime deserved the extreme penalty of the law or a less severe punishment.

"After the act of 1856, which divided the crime into murder of the first and second degrees, *murder* remained, and it still remains, the unlawful killing of a human being with malice aforethought. The malice may be express or implied; the express intent to kill or to commit one of the named felonies may be affirmatively established, or the killing being proved, the malice may be implied, *but in either case the crime is murder.* The fact that a severer penalty is to be imposed in one case than the other, does not change the effect of a previous conviction, and the defendant who, on his own motion, secures a new trial, subjects himself to a retrial on the charge of murder, whether the first verdict was guilty of murder of the first or of the second degree. At the second trial he may, if the evidence justify such verdict, be found guilty of murder of the first degree."

Whilst the rule as above laid down is still followed in California, it is nevertheless established that on new trial the accused cannot be tried a second time for the higher *offense* of which he was acquitted by conviction of the lower, without violating the constitutional provision that, "No person shall be twice put in jeopardy for the same *offense.*" And this in spite of the statutory provision similar to that in New York, that "the granting of a new trial places the parties in the same position as if no new trial had been had." See *People vs. Gordon,* 99 Cal., 227, 33 Pac. Rep., 901, where the court held that after trial for assault with intent to commit murder and conviction of assault with deadly weapon, the accused could not, on new trial, be convicted of the higher offense, saying:

"An assault with intent to commit murder and an assault with a deadly weapon are not the same *offense,* but are different *offenses.*"

Thus the rule in California stands as in New York, as expressed in the cases of *People vs. Dowling,* and *People vs. Palmer, supra,* that while on new trial the accused may be tried for a *higher degree of the same offense,* he cannot be

again tried for any higher *offense* than that of which he was convicted. In the one case the judgment is *inseparable* and is set aside *in toto*—in the other there are two *separable* judgments, one of acquittal and one of conviction, and the latter only is set aside.

Again the California rule is followed in Vermont. Although there is no constitutional or statutory provision in that State guaranteeing immunity from second jeopardy for the same offense, it was held in the case of *State vs. Kittle,* 2 Tyler, 471, that the accused could not be prosecuted on new trial for the higher offense after conviction for a lower. This is the law of Vermont today. Yet in the case of *State vs. Bradley,* 67 Vt., 465, it was held that the defendant tried on indictment for murder in the first degree and convicted of murder in the second degree might on new trial be again tried for murder in the first degree, and this without violating the principle laid down in *State vs. Kittle, supra.*

The court in holding that the defendant might again be tried for murder in the first degree said:

> "We understand this to be the view that has obtained and been practiced upon in this State, when the result of the former trial was not, in effect, as it was not here, an acquittal of another crime charged, but only a failure to find the requisites to aggravate the crime found to a higher *grade. State vs. Kittle,* (2 Tyler, 471), is not to the contrary."

And the case of *State vs. Behimer,* 20 Ohio St., 572, on which great stress was laid by the Government, sustains the same view. In that case the defendant was indicted in a single count for murder in the first degree. He was found guilty of murder in the second degree. In holding that on new trial the defendant might again be tried for murder in the first degree, the court said:

> "The effect of setting aside of the verdict finding the defendant guilty, was to leave at issue and undetermined the fact of the homicide; also the fact

whether the defendant committed it, if one was committed. The legal presumption on his plea of not guilty was of his innocence; and the burden was on the State to prove every essential fact. The only effect, therefore, that could be given to so much of the verdict as acquitted the defendant of murder in the first degree, after the rest of it had been set aside, would be to regard it as finding the qualities of an act while the fact of the existence of the fact was undetermined. This would be a verdict, to the effect, that if the defendant committed the homicide, he did it without 'deliberate and premeditated malice.'

"There can be no legal determination of the character of the malice of a defendant, in respect to a homicide which he is not found to have committed; or rather, of which, under his plea, he is, in law, presumed to be innocent.

"The indictment was for a single homicide. The defendant could, therefore, only be guilty of *one offense*, and could be subject to but one punishment. The *degrees* of the offense differed only in the *quo animo* with which the act causing the homicide was committed. *The question of fact was whether a criminal homicide had been committed, and, if so, whether the circumstances of aggravation were such as to raise it above the grade of manslaughter. If the finding as to the main fact be set aside, the finding as to the circumstances necessarily goes with it.*

* * * * * * *

"It seems to us, therefore, that the necessary result of granting the defendant's motion for a new trial, was to set aside the whole verdict; and this having been done at his own instance, it can neither operate as an acquittal, nor as a bar to the further prosecution of any part of the offense charged. (*Stewart vs. The State*, 15 Ohio St., 155.)

* * * * * * *

"Where, on a trial for murder, the defendant is found guilty of a lower *degree* of homicide than the highest degree charged in the indictment, and, on his motion, a new trial is granted, the effect of granting the new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as on the first trial."

2

It will be seen from the decided cases that the authorities are more or less evenly divided as to whether conviction of a lower *degree* of an offense carries immunity from further prosecution for a higher *degree* on the new trial. In California, New York, Vermont and Ohio, the rule as laid down in the above cases is that the accused may on new trial be again prosecuted for the higher *degree* of the same offense, the courts of these States holding that, as the judgment on first trial is that the criminal act was committed, when that judgment is set aside the fact of whether or not that unlawful act was committed is of course reopened for determination and with that fact the subsidiary facts as to the commission of the alleged unlawful act—whether committed with express malice or implied, etc.—are also necessarily reopened.

On the other hand, in Arkansas (*Johnson vs. State*, 29 Ark., 31), Florida (*Johnson vs. State*, 27 Fla., 245; *Golding vs. State*, 31 Fla., 262), Texas (*Jones vs. State*, 13 Texas, 168), and Washington (*State vs. Murphy*, 13 Wash., 229); and in Missouri before the change in the constitution of 1875 (*State vs. Ross*, 29 Mo., 32), the contrary rule is laid down, viz., that there can be no new trial nor second prosecution for any higher degree of the offense, as well as for any higher offense included in the indictment.

We admit that there is much of reason to support the former rule—that of California, New York, Ohio, Vermont. *We do not fear its application to the case at bar.*

In the case at bar there was the express finding by the trial court that the death of Benito Perez was not the result of defendant's acts. The Court of First Instance found (Rec., 3):

> "From the result of the testimony, it is to be inferred that, although it has been established that the accused are guilty of the assault which caused contusions of a slight character upon Benito Perez, because they arrested him and took him away for the purpose of beating him, still, the testimony does not show that the said contusions were the actual and

proximate cause of the death of the said Benito, and in consequence it follows that the accused are not guilty of the crime of murder, much less of the commission of that crime with great cruelty and evident premeditation, as no proof of these circumstances has been introduced."

Here then is the specific finding and judgment that Peres did *not* meet his death at the hands of the accused. Entirely distinct and separable from that judgment is the other judgment that the defendants were guilty of assault. Manifestly, then, in the case at bar, two distinct and separate judgments were rendered by the Court of First Instance—one acquitting the accused of the crime of murder, the other convicting them of the offense of assault (Rec., 3.) From what did the accused appeal? Manifestly from the judgment of conviction, not from that of acquittal. *Should it then be held that the effect of that judgment is waived in which the defendants acquiesed and upon which they rested?* Would any sane person understandingly appeal upon such condition, or would any sane counsel permit his client to take such appeal?

We cannot conceive a case where counsel would be justified in advising an appeal from judgment involving six months' imprisonment, where there was possibility of capital punishment being inflicted as result thereof.

But it may be said that a judgment at law when set aside is set aside as a whole. This is generally true as regards civil causes, and it is so expressly provided by Federal statute, although, as we have shown above, in many jurisdictions judgments in civil causes are often treated as separable, and new trial had as to only some of the issues covered by the first judgment. But as we have heretofore shown an entirely different rule generally prevails in criminal causes. In every State, except Kentucky, Indiana and Kansas (where there are statutes expressly prescribing as condition of new trial the setting aside of former judgment *as a whole*), Missouri and Georgia (where it is matter of express constitutional

provision), and possibly also in North Carolina (where there is no constitutional guaranty of immunity from second jeopardy), it is held that where there is an acquittal of a higher *offense* charged in the indictment, such judgment of acquittal is separable from the judgment of conviction of the lesser offense, and on new trial granted the judgment of acquittal stands, whilst the judgment of conviction is set aside. In the absence of any Federal statute as to the effect of new trial in *criminal* causes (especially in view of the express provision of section 987, avoiding the former judgment in *civil* causes), this practically universal rule of criminal law should not, we respectfully submit, be departed from.

But in any case, whether the first judgment be set aside in whole or in part, *new trial* must be had. At *law* the jurisdiction of the appellate tribunal is in every case limited to a reversal or affirmance of the judgment below. In no case can the appellate court enter up judgment materially modifying the judgment of the trial court.

In the case at bar there was no new trial. The Supreme Court of the Philippine Islands is not a trial court. The trial ends in the Court of First Instance (*Kepner vs. United States*, 195 U. S., 100, 121).

The Supreme Court of the Philippines is an appellate tribunal, and being such its jurisdiction should, we submit, be regulated by the established principles of appellate procedure. Conceding that the jurisdiction of the Supreme Court of the Philippines is in every case as broad as any appellate jurisdiction known to our jurisprudence—allowing that it had in this cause jurisdiction of as wide a scope as an appellate court would have in an equity cause—nevertheless, we submit, in convicting the defendants of a new offense it overstepped the plain limits of its jurisdiction. In an equity appeal the appellate court, whilst reviewing the whole record, limits itself to consideration of the questions raised on the appeal. If the appellee would attack the decree he must do so by cross-appeal.

> "If appellees desire to avail themselves of error in the decree they should bring a cross-appeal; by omitting to do so they admit the correctness of the decree as to them. *Where the appellant does not succeed in reversing any part of the decree, and the respondent has not brought a cross-appeal, the appellate court cannot reverse or modify the decree in a part which is erroneous as to such respondent.*"
>
> *Beach's Modern Equity Practice*, sec. 935.

As said in *Chittenden vs. Brewster*, 2 Wall. 191, 196:

> "The rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself, and also that the party appealing cannot allege error in the decree against the party not appealing."

See also:

The Osborn, 105 U. S. 447, 451;
Mackall vs. Mackall, 135 U. S. 167, 170;
Farrar vs. Churchill, 135 U. S. 609, 612;
Clark vs. Killian, 103 U. S. 766, 769;
Green vs. Blackwell, 32 N. J. Eq. 768, 771;
Mapes vs. Coffin, 5 Paige, 296;
Townsend vs. Graves, 3 Paige, 453.

When, as declared by this court in *Kepner vs. United States*, 195 U. S. 100, 124, Congress in enacting the Philippine Bill of Rights intended to extend to the inhabitants of the Philippine Islands "those principles of our Government established as rules of law for the maintenance of individual freedom," in the sense that they are applied and administered in this country, is it not manifest that the Supreme Court of the Islands violated those fundamental principles in convicting of a new crime *upon appeal?* Certainly no such proceeding would be possible under the fundamental principles governing the administration of justice in the United States.

III.

The sweeping rule now announced puts every defendant into *actual* peril by an appeal from any judgment of conviction for any crime less grave than the crime charged. He stands in second jeopardy by the very act of appeal. Flagrant error of law may have been committed compelling correction by the reviewing tribunal—such as in the admission or exclusion of evidence, the granting or denial of prayers, or in the judge's charge. Complete innocence of *any* offense may have failed of demonstration and resulting verdict of complete acquittal through such manifest errors. Yet the accused must at his peril receive the benefit of appeal when by such delay the evidence relied upon may by the thousand accidents of life be lost—death or disappearances of witnesses or loss of testimony otherwise may render on new trial his present condition far worse than upon his former trial. All of this risk he must encounter *if* he seeks correction of the errors of law committed against him on the former trial. He has stood once in jeopardy upon trial for murder wherein he has been acquitted of *that* crime, but found guilty of another, *i. e.*, assault. But to correct the errors upon that trial he stands by appeal in jeopardy of a new trial for the very offense of which he has been acquitted. Thus by appeal he encounters instant second jeopardy. Does the law contemplate that result and impose that burden upon his *right* to judicial review of the errors committed at the trial? Is it reasonable to suppose that he seeks to reverse *any* judgment save that actually rendered against him? Ought his *necessities* upon appeal to be conditioned that if he succeeds he *must* again stand in jeopardy of new trial for the crime whereof by the former verdict he has been acquitted? In such view the offer of appeal is vain. It is asking bread and giving a a stone. The accused *must* conclude that it is better to bear the ills he has than fly to others which he knows not of, although innocent in fact of any crime. To say that the

errors of law committed by the trial court may be corrected, but in the very act of correction the former *verdict* of acquittal must go for naught, *is* to say that second jeopardy shall not prevail *unless* the accused by appeal invites it, and then the guaranty of the Constitution must disappear. An appeal permitted only under such an awful burden is in effect a denial of justice. It is the shadow—not the substance. It may shield society against the guilty—but it shuts the door of hope against the innocent. It permits error of law however grievous to go uncorrected, because the price exacted from the accused for its correction is beyond human acceptance. It is not an appeal of *right*, but an appeal fraught with infinite peril. Does not this deny the equal protection of the laws? The man tried and convicted of murder has nothing to lose and everything to gain by an appeal. But the man tried for murder and convicted of assault—a wholly different offense—must, though innocent, accept punishment or assume the peril of another trial for murder (whereof he has been acquitted by the former verdict), if he seeks by appeal to correct the manifest errors of law committed against him by the trial court. The judgment of reversal upon the law must also reverse the verdict on which the judgment rests. And such reversal of verdict sets aside all the benefit of the jeopardy wherein the accused stood before that jury.

The Constitution (amendment, art. V) declares: "Nor "shall any person be subject for the *same offense* to be twice "put in jeopardy of life or limb."

Now for the offense of murder he stand acquitted, but for some *other* and different offense the jury find him guilty. The original offense is gone; the verdict has so declared. If upon appeal and reversal new trial is had the offense for which he must stand trial is not *"the same offense"* whereof he has been acquitted, but another and distinct offense whereof he has been *convicted. It is the acquittal of the offense which then creates the bar.* That is the measure of the guaranty. This is the concrete reasoning of the many cases

in the many courts where *this* conclusion has been affirmed through these many years.

Speaking directly to this point the Supreme Court of California in *People vs. Gilmore,* 4 Cal. 376, 381, well said:

> "If such a rule be established, no man will subject "himself to the risk of being hung for murder, when "convicted of manslaughter, and will prefer in many "instances, although innocent, to rest under the con- "viction than to encounter the danger of a second "trial. In every case where the timid and unfriended "are involved this will be found to be the result, and "in times of high, popular excitement, those who may "be bold in the consciousness of their innocence, will "hesitate before they voluntarily assume so great a "risk, or pay so fearful a premium for the privilege "of asserting that innocence."

IV.

With all respect we submit appeal cannot justly impute waiver of the constitutional guaranty. The guaranty is complete *per se,* and if no appeal is taken the opinion concedes its effect as an absolute bar. But the appeal is also matter of *right* given by express statute. To hold the exercise of the latter as a waiver of the former is to declare unnecessary conflict between two affirmative rights—one constitutional and protective, the other statutory and corrective. It is to hence engraft an exception upon the constitutional guaranty arising from the exercise of a right conferred in *protection* of the accused. To say that the guaranty against second jeopardy is waived *if* the accused avails himself of the right of appeal is, we respectfully submit, to put into the constitutional guaranty a limitation by construction alone and *against* the right guaranteed. Is not that a narrow interpretation of the law? Is it not restricting the guaranty when the applicable rule of interpretation of such provisions is the exact opposite? The liberty of the citizen, his protection against second prosecution for the same offense, is the manifest object and intention

of the Constitution. Ought that protection to be narrowed in its scope solely upon the assumption that the right of appeal was intended as a waiver of the guaranty? There is no conflict between the provisions. Ought conflict to be *created* by construction? Certainly each provision can stand in complete harmony. Numerous decisions of many courts have so declared with forceful and cogent reasoning.

We repeat—*acquittal* of the crime charged is the measure of the bar. Conviction of another and lesser crime is the plain and sole subject-matter of appeal. Reversal of the judgment of conviction thereon is hence the only and necessary measure of the appeal. The appeal is given as of right. To expand its effect to the destruction of the acquittal of the higher offense and to declare the accused subject *de novo* to second trial for the offense whereof he was acquitted is to subject him "for the same offense to be twice put in jeopardy of life or limb," for the offense of which he was *convicted* is the measure of the offense for which he seeks review, and *that* is not the measure of the greater offense whereof he has stood in jeopardy and been acquitted.

In *People vs. Gilmore, supra*, it was thus held:

> "It has been urged that the party voluntarily put "himself in this jeopardy. Such is not the case. The "act, if we are to give it the construction contended "for on the part of the State, takes from the party a "right which he before possessed, and necessarily sub- "jects him to a second jeopardy if he wishes to main- "tain that right, or assert his innocence. This is a "subjection by operation of law and not by act of the "party; and if it were otherwise, I have shown that no "party can voluntarily subject himself to a second "trial after an acquittal, and that the courts have no "jurisdiction over him."

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No. 34.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

VALENTIN TRONO, MAXIMO ANGELES, AND TIMOTEO NATIVIDAD, plaintiffs in error,

v.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

No. 34.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

VALENTIN TRONO, MAXIMO ANGELES, AND TIBURCIO NATIVIDAD, plaintiffs in error,

v.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

THE FACTS.

This is a criminal case coming up from the Philippine Islands. The offense appears to have been a brutal killing, although, perhaps, murder was not intended. The facts, as they appear in the decision of the Court of First Instance (Rec., p. 2) and the opinion of the Supreme Court of the Philippine Islands (p. 5), have been stipulated into the case (p. 28) as sufficient without the evidence.

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The victim, Benito Perez, was suspected of stealing a revolver belonging to Angeles. He was charged with the theft, and Trono, a policeman at Hagonoy, Bulacan Province, with Angeles, Natividad, and two other policemen, arrested him and took him outside the village late at night to the banks of a stream and the defendants beat him with the butts of their guns so that he died on the morning of the second day following. There is some reason for thinking that Natividad was rather an accomplice, aiding and abetting, than a principal, but one of the judges of the Supreme Court thought otherwise. (Rec., p. 11.)

The defendants were charged with cruel and premeditated murder (*assesinato*) on complaint of the victim's mother before a justice of the peace at Hagonoy, who held them for trial before the Court of First Instance (Rec., p. 2). They were tried and convicted before the court of First Instance of assault (*lesiones menos graves*), included in the crime of murder—that court holding that they were not guilty of murder. They were sentenced to six months' imprisonment (*arresto mayor*) and to pay a fine of 100 pesos Mexican currency to the heirs of the deceased.

They thereupon took an appeal to the Supreme Court of the Islands, which found that the death was due to the assault; that the circumstances were aggravated, although the deliberate intent of murder was not present; and that Angeles and Trono were principals and Natividad an accomplice. The grade of the crime was raised to homicide (*homicidio*). Angeles and Trono were sentenced to imprisonment for the

term of fourteen years, eight months, and one day (*reclusion temporal*) and Natividad to eight years and one day (*prision mayor*), with a fine in all three cases by way of indemnity to the family of the deceased. All the members of the court concurred excepting Willard, J., who thought that Natividad should be condemned as a coprincipal and receive the same penalty.

A writ of error to this court was then sued out under section 10 of the act of July 1, 1902 (32 Stat., 691, 695). That provision confers upon this court jurisdiction to review final judgments of the Supreme Court of the Philippine Islands in all cases in which (*inter alia*) "any statute, treaty, title, right, or privilege of the United States is involved," in the same manner, as far a applicable, as final judgments of the Circuit Courts of the United States.

THE LAW.

The jurisdiction of the Court of First Instance to try offenses of the character involved here is conferred by act No. 136 of the Philippine Commission of June 11, 1901 (1 Acts, Phil. Com., p. 252). By section 56 of that act it is provided (p. 262):

> Courts of First Instance shall have original jurisdiction—
>
> * * * * *
>
> 6. In all criminal cases in which a penalty of more than six months' imprisonment or a fine exceeding one hundred dollars may be imposed.

By section 18 of that act it is provided that—

> The Supreme Court [of the Philippine Islands] shall have appellate jurisdiction of all actions

> and special proceedings properly brought to it from Courts of First Instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the Supreme Court.

The extent and character of the jurisdiction of the Supreme Court are declared by section 39 of that act, which abolished the "existing Audiencia or Supreme Court" and substituted in place thereof "the Supreme Court provided by this act."

The right of appeal from the Courts of First Instance to the Supreme Court is conferred by section 43 of General Orders, No. 58, of December 18, 1899 (Phil. Laws, vol. 1, p. 1087), which provides:

> From all final judgments of the Courts of First Instance or courts of similar jurisdiction, and in all cases in which the law now provides for appeals from said courts, an appeal may be taken to the Supreme Court as hereinafter provided.

The succeeding sections point out the manner and fix the time within which the appeal shall be taken.

By section 32 of that order it is provided:

> In Courts of First Instance or of similar jurisdiction each witness must be duly sworn and his testimony reduced to writing as a deposition by the court or under its direction. * * * In cases where an official stenographer is engaged the testimony and proceedings may be taken by him in shorthand, and * * * a transcript of the record made by the official stenographer and certified as correct

by him shall be prima facie a correct statement of such testimony and proceedings.

Section 50 of that order requires that—

> The record of all cases in which the death penalty, or imprisonment exceeding one year, or a fine exceeding two hundred and fifty pesos, exclusive of costs of trial, shall have been imposed, shall be forwarded to the clerk of the criminal branch of the Supreme Court within twenty days, but not earlier than fifteen days, after the rendition of the sentence. All cases * * * in which an appeal shall have been taken, shall be submitted to the criminal branch of the Supreme Court, and shall thereafter take the same course as is now provided by law.

A method of reopening a case is provided by section 42 of that order as follows:

> At any time before the final entry of a judgment for conviction, the defendant may move, either in the court in which the trial was had or on appeal to a higher court, for a reopening of the case upon the ground of newly discovered evidence material to his defense. The motion must be made to the court which pronounced sentence, or to the appellate court if the case shall have been appealed, and must be made in writing and be supported by the affidavits of the witnesses by whom such evidence is expected to be given, or by duly authenticated copies of documents which it is proposed to introduce in evidence. * * * In courts of higher jurisdiction the decision of the court on such motions shall be in writing,

> and, together with the motion and affidavit, shall be attached to the papers in the case, and any evidence admitted must be taken and recorded as upon the original hearing. The *new hearing*, if allowed, *shall take place in the court of original jurisdiction.*

By the act of July 1, 1902 (32 Stat., 691), Congress ratified the action of the President in creating the Philippine Commission and in investing it with the powers of government; and by section 9 thereof provided:

> That the Supreme Court and Courts of First Instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said government to change the practice and method of procedure.

The foregoing seem to be all the pertinent provisions of law necessary to a determination of the question involved in this case.

ARGUMENT.

Since this court has held that Congress has not extended to the Philippine Islands the right of trial by jury, and that as to them such right is not fundamental in its nature (*Dorr* v. *United States*, 195 U. S., 138, 148) (and it is not asserted here), that question is eliminated from consideration in the discussion of the sole question involved in this case. Briefly stated, that question is this:

Did the Supreme Court of the Philippine Islands, by finding and adjudging the defendants below guilty

of the crime of homicide, upon the hearing of their appeal from the judgment of the Court of First Instance finding them guilty of assault only, place them in jeopardy a second time for the crime of homicide, in violation of section 5 of the act of Congress of July 1, 1902 (32 Stat., 692), which declares that—

> No person for the same offense shall be twice put in jeopardy of punishment.

As will be perceived, this is an entirely different aspect of the question of second jeopardy from that presented and decided in *Kepner* v. *United States* (195 U. S., 100).

Before taking up the discussion of the ultimate question in this case, I deem it proper first to discuss the preliminary questions, the determination of which is necessary to the proper conclusion in the final one.

I.

THE NATURE OF THE APPEAL UNDER PHILIPPINE LAW.

Under the Philippine law, the appeal given to the Supreme Court vested in that body the authority to review the entire case, both upon the facts and upon the law. So in *United States* v. *Atienza* (1 Phil. Rep., 736) it was held that the court has jurisdiction on appeal in criminal cases identical with that of the Audiencia, for which it was substituted, and may review the whole case. Upon the point of the defense that the jurisdiction created by the Philippine Commission's act (No. 136) excludes the idea of the au-

thority possessed by the Spanish Audiencia to review the case upon appeal, the court says (p. 737):

> The term "appellate jurisdiction" is here used [in the Philippine Act] in a general sense, meaning simply a jurisdiction to review the judgment of the inferior court. Whether the jurisdiction is to reexamine the facts, or the law, or both, and with what limitations and under what conditions, is left undetermined by section 18, except as it is provided that it is to be exercised in "all actions and special proceedings properly brought to it" from the tribunals described. To ascertain what cases may be properly brought to the Supreme Court for review and what matters may be reviewed in such cases, reference must be had to other provisions of law. By section 39 of the same act "the existing Audiencia or Supreme Court" was "abolished" and this court "substituted in place thereof." Being substituted in place of the existing Audiencia, clearly its jurisdiction was the same as that tribunal possessed unless and until otherwise provided. Nowhere in act No. 136 is its appellate jurisdiction defined as respects either civil or criminal cases. It was thus left exactly as it stood prior to the passage of that act. In civil cases it remained that of the Audiencia until the change effected by the Code of Civil Procedure. In criminal cases the Commission has not seen fit up to the present time to modify it, and it therefore still remains identical with that exercised by the Audiencia.

And in *United States* v. *Abijan* (1 Phil. Rep., 83) it was said:

> This court is fully authorized to increase the penalty and apply the proper provisions of the penal law, since the right of appeal exercised by the accused confers upon the court full jurisdiction and renders it competent to examine the record and revise the judgment appealed from.

These decisions are in harmony with the decision of this court in the case of *United States* v. *Goodwin* (7 Cranch, 108), wherein Mr. Justice Washington, speaking of the nature and effect of an appeal, says (p. 110):

> An appeal is a civil-law process, and removes a cause entirely, subjecting the law and fact, to a review and retrial. A writ of error is a common-law process, and removes for reexamination, nothing but the law.

To the same effect is the decision in *Dower* v. *Richards* (151 U. S., 658, 663), and cases therein cited.

It is apparent from these decisions that the Supreme Court of the islands was vested with full authority upon the appeal to retry the entire case anew, and to render such judgment as the evidence and the law demanded, unless the doctrine of second jeopardy under the present circumstances, as in the *Kepner* case, imperatively requires that the Philippine law of Criminal Procedure shall be abrogated.

II.

THE EFFECT OF THE TAKING OF AN APPEAL BY THE ACCUSED.

It is settled law that a review by an appellate court of the final judgment in a criminal case was not, at common law, and is not now, a necessary element of due process of law, but is merely a privilege accorded the accused by statute, and that a person who avails of the privilege thereby assents to the conditions attached to it.

As to the right to increase the punishment, it is certain that in the Philippines under Spanish procedure as continued by us, if an accused were convicted by the trial court, the *Audiencia* (Supreme Court) upon review might raise or lower his punishment or acquit him altogether. "This was the law of the land when the change of sovereignty took place, and it has only been modified since to the extent of making the judgments of courts of first instance in felony cases (except those for capital offences) final unless an appeal has been taken either by the Attorney-General or the accused." (*United States* v. *Kepner*, 1 Phil. Rep., 397, 401.) That this was the ancient Spanish practice is also fully shown by the brief of the Government and its separate appendix filed in this court when the Kepner case was heard on writ of error.

When, therefore, the defendants below, after their conviction in the Court of First Instance, took their appeal to the Supreme Court, they did so upon the condition and with the full knowledge that the appeal gave the appellate court the right to retry the case and

to render such judgment as it saw fit, without regard to the judgment rendered in the lower court. They asked the privilege of a new trial in the appellate court; to this privilege there was attached the condition that upon the trial of the case that court might increase the punishment. They accepted the privilege, and can not now complain of the risks attached to it. If they felt aggrieved by the decision, they might have asked for a reopening of the case as provided in section 42 of General Order 58.

Doubtless they had no further testimony to offer or it is to be presumed they would have taken that course. The Appellate Court therefore had full power to try the case anew and did so. The mere fact that this retrial was upon the record as made up in the lower court instead of by a reexamination of witnesses rendered the trial none the less a new trial; for there is no difference in principle between an Appellate Court taking and retrying a case or reversing a judgment and sending it back to the lower court for a retrial. So we say that by taking their appeal the defendants assented to the conditions upon which it was granted, and thereby waived any right they had to rely, to any extent, upon the judgment finding them guilty of assault in the Court of First Instance as a shield against their conviction for a higher offense by the Supreme Court upon appeal.

The Government contends that the following decisions fully sustain this contention:

McKane v. *Durston*, 153 U. S., 684.

In that case, the court, Mr. Justice Harlan delivering the opinion, speaking with respect to the right of a person convicted of an offense to have an appeal to a higher court, says (p. 687):

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.
>
> It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. * * * Whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.

This language was quoted with approval in *Andrews* v. *Swartz* (156 U. S., 272, 275); and in *Kohl* v. *Lehlback* (160 U. S., 293, 297).

In *Murphy* v. *Mass.* (177 U. S., 155) this court, speaking by Mr. Justice Harlan, says (p. 158):

> We have repeatedly decided that the review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, is not a necessary element of due process of law, and that the right of appeal may be accorded by the State

> to the accused upon such conditions as the State deems proper. (Citing the foregoing cases.)

And he continues:

> In prosecuting his former writ of error plaintiff in error voluntarily accepted the result, and it is well settled that a convicted person can not by his own act avoid the jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy.

In *United States* v. *Keen* (26 Fed. Cas., 686) Mr. Justice McLean states the rule in these words:

> The assent of a prisoner to a proceeding designed for his benefit [as, for instance, a motion for a new trial] takes from him the right, as it manifestly should do, of setting up such proceeding in bar of another trial.

State authorities are in full accord. *Commonwealth* v. *Arnold* (83 Ky., 1, 4); *Briggs* v. *Com.* (82 Va., 554, 561); *State* v. *Hart* (33 Kan., 218, 222); *Kansas* v. *McCord* (8 Kan., 232, 243); *People* v. *Palmer* (109 N. Y., 413, 418).

III.

THE EFFECT OF THE SETTING ASIDE OF A VERDICT OR THE REVERSAL OF A JUDGMENT.

The Government asserts that when, in any criminal case in which a single offense is charged, a verdict of guilty is set aside and a new trial granted, or a judgment upon a verdict of guilty is reversed in an appellate court and a new trial granted, the effect is to annul the action and finding of the jury as effectually as if the case had never been tried or a verdict returned.

This doctrine will hardly be disputed in civil cases, and we think it applies equally in criminal cases. The principle being the same, the effect likewise should be the same.

In *United States* v. *Keen* (26 Fed. Cas., 686) (decided in 1839) Mr. Justice McLean sitting on the circuit, in discussing the question of the power of a court to grant a new trial, and the effect of setting aside a verdict of guilty upon the motion of the defendant, said (p. 689):

> The assent of a prisoner to a proceeding designed for his benefit takes from him the right, as it manifestly should do, of setting up such proceeding in bar of another trial. If he was in jeopardy by the first trial, *by his consent that verdict is set aside and annulled; and for every legal objection the verdict and the proceedings which led to it, are as though they never had been.*

Blackstone, in speaking of the effect of a reversal of an attainder for murder, says (4 Com., 336, 337):

> Where the former attainder is reversed for error, it is the same as if it had never been.

In *Lockwood* v. *Jones* (7 Conn., 436) Judge Hosmer, speaking for the court, says:

> By the operation of the new trial the cause, in contemplation of law, is precisely in the same condition as if no judgment had ever been rendered.

And this language is quoted with approval in *Zaleski* v. *Clark* (45 Conn., 397), the court saying (p. 402):

> The new trials thus granted [under statutes], so far as we are able to learn, were new trials of the entire issue of fact made in the case, precisely as if there had been no former trial.

So in *Rassmussen* v. *State* (63 Wis., 1) the court, in attempting to distinguish that case, which involved a minor offense, from the rule laid down in cases of homicide, says with respect to the effect of the granting of a motion for a new trial (p. 3):

> It may be said that a new trial, in a case of homicide, effectually extinguishes the former conviction, and opens the whole case for a trial *de novo*.

In *Bailey* v. *State* (26 Ga., 579), it is said (p. 581):

> The effect of the reversal of the judgment of the court below is to annul it as effectually as if it had never been rendered.

In *Reg* v. *Drury* (3 Cox Crim. Cases, 544) Mr. Justice Coleridge, in speaking of the effect of a reversal of a judgment, says (p. 546):

> The judgment reversed is the same as no judgment.

See also *Donahue* v. *Klassner* (22 Mich., 252, 254); *Crawford* v. *Morris* (5 Gratt., 90, 103); *People* v. *Gordon* (99 Cal., 232); *Edwards* v. *Edwards* (22 Ill., 123).

In *Grayson* v. *Com.* (6 Gratt., 712), it is said (p. 723) "that motions for new trials are governed by the same rules in criminal as in civil cases."

IV.

THE ULTIMATE QUESTION.

The ultimate question in this case is whether the Supreme Court of the Philippine Islands, upon the trial of the appeal of the accused persons, by trying them anew upon the charge of murder and finding them guilty of homicide, after they had been found guilty of assault only by the Court of First Instance, twice placed them in jeopardy upon the charge of murder, in contravention of section 5 of the act of Congress of July 1, 1902 (32 Stat., 692), which declares that—

> No person for the same offense shall be twice put in jeopardy of punishment.

Before proceeding with the discussion of the question it is proper to state that but one decision has been found in which the Federal courts have directly ruled upon the point, and that ruling is in harmony with the Government's contention. The ruling will be referred to later.

In the State courts the question has been decided both ways; but in a majority of the States in which the question has been raised the decisions have been in favor of the rule claimed for the plaintiffs in error. On the other hand, in quite a number of the States the contrary doctrine has been declared and supported by well-considered opinions.

The cases cited holding contrary to the contention of the Government are the following:

Sylvester v. *State*, 72 Ala., 201;
Johnson v. *State*, 29 Ark., 31;
People v. *Gordon*, 99 Cal., 227;
Johnson v. *State*, 27 Fla., 245;
Golding v. *State*, 31 Fla., 262;
Brennan v. *People*, 15 Ill., 511;
Barnett v. *People*, 54 Ill., 325;
State v. *Helm*, 92 Iowa, 540;
State v. *Foster*, 7 La. Ann., 255;
State v. *Victor*, 36 La. Ann., 978;
People v. *Knapp*, 26 Mich., 112;
People v. *Comstock*, 55 Mich., 405;
State v. *Lessing*, 16 Minn., 75;
Hurt v. *State*, 25 Miss., 378;
State v. *Steeves*, 29 Oreg., 85;
Jones v. *State*, 13 Texas, 168;
Stuart v. *Com.*, 28 Gratt. (Va.), 950;
Forbes v. *Com.*, 90 Va., 550;
Benton v. *Com.*, 91 Va., 782;
State v. *Murphy*, 13 Wash., 229;
State v. *Martin*, 30 Wis., 216; and
State v. *Belden*, 33 Wis., 120.

It may be said in passing that there are vigorous dissents in some of these cases.

The cases which, as we think, sustain the Government's position are the following:

United States v. *Harding*, 26 Fed. Cas., 131;
United States v. *Keen*, 26 Fed. Cas., 686;
People v. *Keefer*, 65 Cal., 232;
People v. *Carty*, 77 Cal., 213;
State v. *Lee*, 65 Conn., 265;
Bailey v. *State*, 26 Ga., 579;
Small v. *State*, 63 Ga., 386;

Veatch v. *State*, 60 Ind., 291;
State v. *McCord*, 8 Kans., 232;
State v. *Terreso*, 56 Kans., 126;
Com. v. *Arnold*, 83 Ky., 1;
Bohannan v. *State*, 18 Nebr., 57;
People v. *Palmer*, 109 N. Y., 413;
State v. *Stanton*, 1 Ired. (N. C.), 424;
State v. *Behimer*, 20 Ohio St., 572;
State v. *Commissioners*, 3 Hill (S. C.), 239;
State v. *Bradley*, 67 Vt., 465;
Briggs v. *Com.*, 82 Va., 554; and
Rasmussen v. *State*, 63 Wis., 1.

It may be well to point out that in the following States there is no constitutional provision respecting double jeopardy: Maryland, Massachusetts, Connecticut, North Carolina, Rhode Island, Vermont, Virginia, and West Virginia.

Proceeding with this branch of the subject, I shall first refer to those cases which uphold the doctrine of implied acquittal. In a large number of those cases no reasons are given for the conclusion reached. I shall content myself, therefore, with an analysis of some of that class of cases in which the reasons for the conclusion are given, with a view to pointing out what I believe to be their unsoundness; and shall then take up the cases which sustain the contention of the Government.

VIRGINIA CASES.

In *Livingston* v. *Com.* (14 Gratt., 592), while a decision upon the point was held not to be necessary to a determination of the case, Judge Daniel entered into

a full discussion of the question and reached the conclusion that where, upon the trial of an indictment the accused is found guilty of a lower grade of offense than that charged and a new trial is granted him, he can not again be tried for a higher offense than that of which he was convicted; but Judges Moncure and Samuel who sat with him in the case did not agree with him upon that point, and the case was sent back for a retrial upon the original charge.

In *Stuart* v. *Com.* (28 Gratt., 950) the court followed the views expressed by Judge Daniel in the Livingston case, Judge Staple, who delivered the opinion, saying that up to that time the question "must be considered unsettled in Virginia" (p. 958). Judge Moncure dissented.

Following this decision (the constitution of that State having no provision respecting double jeopardy), the legislature changed the rule by providing that "if a verdict be set aside on the motion of the accused, and a new trial is awarded, on such new trial the accused shall be tried, and such verdict may be found and sentence pronounced as if a former verdict had not been found."

Then followed the decision in *Briggs* v. *Com.* (82 Va., 554), which sustained the validity of the act of the legislature above quoted. Speaking of the power of the legislature in this regard, the court says (pp. 559, 560):

> The Constitution of the United States provides that "no person shall be subject for the

> same offense to be twice placed in jeopardy of life or limb." And although this provision binds only the United States, not extending to a State, our courts have received and followed it as expressive of the common-law rule. And our legislatures have extended and regulated the application of the principle as they appear to have the power to do under our constitution, which has granted to the legislature all legislative powers and is upon this subject silent. * * * This subject, as we have seen, is within the scope of legitimate legislative action in this State; and the power of the legislature, not being limited by any express constitutional provision, is supreme.

After quoting the legislative provision the court continues (p. 561):

> Of what can such a person claim to have been acquitted? He is charged with murder and found guilty of murder; the jury held him guilty of murder in the second degree. The verdict has been set aside on his motion and a new trial granted; obviously the new trial, if had at all, upon this indictment must be had for murder; the finding of the first jury has been set aside; it no longer exists. * * *

Answering the claim of double jeopardy, the court continues (p. 561):

> The accused waived whatever right he had under the law not to be tried again by obtaining a reversal of the first judgment. The law of waiver comes from the principle of natural justice, that a man is not entitled to complain of

> that to which he has consented. The principle is illustrated all along the course of our criminal jurisprudence.

After the decision in the *Briggs* case, the legislature changed the rule by providing that if a conviction in a criminal case be set aside and a new trial granted, the accused "shall not be tried for any higher offense than that of which he was convicted on the last trial."

Then followed the cases of *Forbes* v. *Com.* (90 Va., 550) and *Benton* v. *Com.* (91 Va., 782), in which the statutory rule was observed. In the latter case, the court, speaking of the effect of the granting of a new trial with respect to double jeopardy, says (p. 789):

> When an accused is convicted of an offense, and applies for and obtains a new trial, he thereby waives his former jeopardy and subjects himself to further trial. As a general principle, this can not be questioned.

From this review it will be observed that there is but little uniformity, if any, in the Virginia decisions. What is said upon the point of waiver would seem to offset what is said upon the subject of implied acquittal; and, finally, the legislature laid down the rule now followed.

CALIFORNIA CASES.

In *People* v. *Keefer* (65 Cal., 232), Keefer had been indicted for murder, but was found guilty of murder of the second degree. Upon his motion, he was granted a new trial. Upon his second trial his attorney asked the court to instruct the jury that by reason of the former verdict of guilty of murder of the second

degree, the defendant could not be convicted of murder of the first degree. This request was refused and the refusal assigned as error in the Supreme Court. The Supreme Court held that the finding of the first jury did not preclude a retrial upon the charge of murder of the first degree.

The California statutes defining murder were the following:

> SEC. 187. Murder is the unlawful killing of a human being, with malice aforethought.
>
> SEC. 189. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree.

Murder of the first degree was punishable with death or life imprisonment; murder of the second degree with imprisonment for not less than ten years.

The case of *People* v. *Carly* (77 Cal., 213) follows the rule laid down in *People* v. *Keefer* (*supra*). The opinion is very short, but one of the propositions of the syllabus is as follows:

> A conviction of manslaughter under an indictment for murder, which is reversed on the appeal of the defendant, will not justify a plea of once in jeopardy and former acquittal upon the new trial for murder, under the same indictment.

But the decision in *People* v. *Gordon* (99 Cal., 227), is to the opposite effect. Gordon was charged with assault to commit murder, but was found guilty of assault with a deadly weapon. Upon his motion the judgment was reversed and a new trial granted. Upon his second trial he pleaded former acquittal as to any grade of offense included within the indictment higher than that upon which he had been found guilty. This plea was overruled and assigned as error in the Supreme Court.

The Supreme Court sustained his plea and held the action of the trial court to be erroneous for the reason that his conviction of the one offense operated as an acquittal as to all higher grades of offense included within the indictment. The court attempts to distinguish the *Keefer* case (*supra*) in this language (p. 231):

> The defendant (Keefer) was indicted for the crime of murder and convicted of murder of the second degree. On his motion a new trial was granted. * * * It was accordingly held that the defendant had subjected himself to a retrial on the charge of murder, and that on such retrial he might be found guilty of murder of the first degree if the evidence would warrant such a verdict. That case is not in point here, for the reason that assault with an intent to commit murder and an assault with a deadly weapon are not the same offense, but are different offenses.

I am unable to comprehend the force of this logic. Murder in the second degree, under the California

statute, is as different from murder in the first degree as an assault with intent to commit murder is from an assault with a deadly weapon. In finding Keefer guilty of murder in the second degree the jury must have found that the killing was not done by the means and with the premeditated intent necessary to make it a crime of the first degree. If the rule laid down by the court be correct, then this finding of the absence of the use of these means and of the intent in the killing by Keefer was just as conclusive upon the second jury in the *Keefer* case as in the *Gordon* case. True, he was not acquitted of murder, but under the theory of the court he was acquitted of murder in the first degree. According to the rule laid down by the court, if the legislature had made the offense manslaughter instead of murder in the second degree, to have retried him for murder would have been double jeopardy, but because it was designated as murder in the second degree it would not be. Certainly this is sacrificing substance for the name.

And then the court lays down this inconsistent doctrine (p. 232):

> There can be no doubt that the granting of the new trial, upon the application of the accused, of an offense of which he has been convicted places him in the same position as if no trial had been had.

WISCONSIN CASES.

In *State* v. *Martin* (30 Wis., 216) it was held that one found guilty of a lower grade of crime than that

charged in the indictment, after a reversal of the judgment on his motion, could not be retried for the higher offense, the conviction of the lower grade of offense operating as an acquittal of the higher offense.

But in *Rasmussen* v. *State* (63 Wis., 1), the court lays down a different rule in the case of a minor offense. Rasmussen was charged in a justice court with assault and battery, but was convicted of a simple assault. He took an appeal to the Circuit Court, where his case was retried and he was convicted of assault and battery. He carried his case to the Supreme Court, alleging that by his conviction of simple assault in the justice court the Circuit Court was without the power to try him for assault and battery. The court, however, overruled his contention, saying (p. 3):

> It is true, this court has held in cases of homicide where the accused was found guilty, for instance, of murder in the second degree, that this was virtually an acquittal of a higher crime, of which he could not be convicted on a new trial [citing cases]. * * * But we think that rule should not be extended to a case like the present. Where a party takes an appeal from a justice's judgment in a criminal case, the effect of the appeal is to open the whole case for a trial *de novo* in the Circuit Court. The case is tried in that court as though originally brought there and the court awards sentence on the conviction without any regard to the judgment rendered by the justice [citing cases]. * * * It may be said that a new trial in a case of homicide, effectually ex-

tinguishes the former conviction, and opens the whole case for a trial *de novo*. But, as we have said, the rule which has been established in the latter class of cases should not be extended to a mere misdemeanor.

It is difficult to grasp the attempted distinction made between felonies and misdemeanors. Why, in case of a misdemeanor, if the defendant appeals, "the effect of the appeal is to open the whole case for a trial *de novo* in the appellate court," and to authorize that court to "award sentence on the conviction without regard to the judgment rendered by the lower court," and in the case of a felony it does not have that effect, and does not so authorize the appellate court, is beyond my comprehension. If the constitutional provision does not prohibit such a retrial in cases of misdemeanor, why should it do so in cases of felony? The distinction is not based upon principle, and is but an arbitrary classification.

THE OREGON CASE.

In *State* v. *Steeves* (29 Oregon, 85), the court held that where a defendant appeals from a conviction for manslaughter in a trial for murder, and a new trial is granted him, he can not again be tried for any offense higher than manslaughter. But it lays down this doctrine, as it says, "in the absence of a statute declaring the effect of a reversal of the judgment" (p. 111.) This, in effect, is an admission that the rule might be changed by statute. But if the rule adopted by the court be the rule required by the constitution, how can it be changed by statute? To concede that it may be

changed by statute is to concede that it is not the rule required by the Constitution; in other words, it is to concede that it is an arbitrary rule established by the court.

The same rule is laid down in *State* v. *Murphy* (13 Wash., 229). There was, however, a very vigorous dissent by Judge Dunbar. He rejects the theory of implied acquittal in these words (p. 236):

> I do not believe that the refined distinctions discovered and indorsed by the majority exist in fact, or are founded in reason, and hence they ought not to have any place in the practical operation of the law. To my mind the common-sense idea is, that when a defendant convicted of murder or any other crime seeks and obtains a new trial, it is a *new trial* which is accorded him, and not a trial for some other crime, and that he should be compelled to enter into the new trial subject to the same penalties that confronted him on the first trial. The whole object of granting him a new trial is to insure him a trial freed from the errors which prejudiced him in the first.

THE CASES FOR THE GOVERNMENT.

In taking up the cases which uphold the contention of the Government that a reversal of a judgment of conviction or a setting aside of a verdict of guilty upon the motion of the defendant expunges or annuls the jeopardy of the first trial, and that upon a retrial upon an indictment containing a single count the accused may be tried and found guilty of any offense included

within the crime charged regardless of the verdict upon the former trial, it is not deemed necessary to refer in detail to all of the cases in harmony with this contention. Reference to a large number of them has been made in this brief. A few of the more important of the cases will be considered.

(a) THE FEDERAL CASES.

A careful search of the reports reveals but one case in which the precise question was raised and passed upon. That is the case of *United States* v. *Harding et al.* (tried in 1846; 26 Fed. Cas., 131).

Harding, Grimes, and Williams were jointly indicted for murder. Put upon trial, Harding was found guilty of murder and Grimes and Williams of manslaughter. Motions for a new trial were filed. The motion as to Harding was first granted. Before passing upon the motions of those convicted of manslaughter, they were fully advised as to the risk they assumed in case new trials were granted them.

Mr. Justice Grier, sitting on the circuit, cautioned the defendants with respect to the law as follows (p. 138):

> William Grimes and John Williams: You ought clearly to understand and weigh well the position in which you now stand. You have been once tried and acquitted of the higher grade of offense charged against you in this indictment, the penalty affixed to which is death; but you have been convicted of the minor offense of manslaughter. Your lives have been in

jeopardy, and you have escaped. The Constitution of your country declares that "no person shall be twice put in jeopardy of life or limb for the same offense." This is to shield you against oppression and injustice, and puts it out of the power of the court to subject you to the danger of another trial, except at your election and request. We believe that you have a right to waive the protection thrown around you by the Constitution, for the sake of obtaining what may seem to you a greater good. But let me now solemnly warn you to consider well the choice you shall make. Another jury instead of acquitting you altogether may find you guilty of the whole indictment, and thus your lives may become forfeit to the law. If you choose to run this risk, and to again put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record, the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you.

The case of *United States* v. *Keen*, ante (decided in 1839; 26 Fed. Cas., 686), while not directly in point, we think supports the Government's view of the rule. That case was decided by Mr. Justice McLean and was this:

Keen had been indicted, tried, and found guilty of stealing a letter from the mails. He filed a motion for a new trial, and the question arose as to whether the court had authority to grant a new trial in crimes of that magnitude. Mr. Justice McLean delivered the

opinion. In discussing the question of the power of the court to grant a new trial, and of the effect of the setting aside of the verdict upon the motion of the defendant, the court says (p. 689):

> The assent of a prisoner to a proceeding designed for his benefit [as, for instance, a motion for a new trial] takes from him the right, as it manifestly should do, of setting up such proceedings in bar of another trial. If he was in jeopardy by the first verdict, by his consent that verdict is set aside and annulled; and for every legal objection the verdict and the proceedings which led to it *are as though they never had been.*

This decision necessarily means that in holding that the setting aside of the verdict annulled all proceedings and rendered them "as though they had never been," the court would have overruled any plea of former jeopardy by reason of any former trial, in a case where there was but a single count in the indictment and a conviction of any offense included within the general charge.

Kring v. *Missouri* (107 U. S., 221) is instructive, as showing the view of the court upon the question of the power of a State to change by constitutional amendment, or by statute, the rule with respect to a retrial of a person upon an indictment after a conviction for a lower grade of offense than that actually charged and a setting aside of the verdict or a reversal of the judgment upon the motion of the defendant. While the direct question was as to whether an amendment to the

constitution of Missouri was *ex post facto*, when applied in the trial of Kring for an offense committed prior to the adoption of the amendment, the court, Mr. Justice Miller delivering the opinion, says, respecting the power of the State to change the rule (p. 225):

> There is no question of the right of the State of Missouri, either by her fundamental law or *by an ordinary act of legislation*, to abolish this rule, and that it is a valid law as to all offenses committed after its enactment.

This in effect holds that to retry an accused, after a conviction of a lower offense than that charged, and after a setting aside of the verdict upon the motion of the accused, is not twice placing the accused in jeopardy within the meaning of the double jeopardy clause of either the Federal or the State constitution.

In *Kepner* v. *United States* (195 U. S., 100) Mr. Justice Holmes, in his dissenting opinion, speaking of those cases which uphold the doctrine of implied acquittal, says he believes "the decisions referred to to be wrong."

(b) THE STATE CASES.

The following are some of the important State cases which sustain the rule for which we contend:

People v. *Palmer* (109 N. Y., 413):

The defendant had been indicted for an assault in the first degree. He was convicted of assault in the third degree. On his appeal the judgment was reversed, and the case remanded to the trial court for a new trial. The defendant asked that the order of

reversal be amended so as to show that the new trial should be for assault in the third degree only, alleging that his former conviction operated as an acquittal of the crime for which he was indicted. The court declined to amend its order, and the defendant appealed to the Court of Appeals, which court affirmed the action of the lower court.

Section 544 of the Code of Criminal Procedure, under which he was tried, provided in substance that when a new trial is ordered after a reversal of conviction on appeal, it shall proceed in "all respects as if no trial had been had." It was contended that this provision of the code was in conflict with article 1, section 6, of the constitution of that State, which prohibits a person from being twice put in jeopardy for the same offense. Respecting this contention the court says (p. 416):

> The question brought before us by this appeal is whether, when the defendant, having been found guilty and sentenced for a lower degree of the crime charged in the indictment, has appealed to the Supreme Court upon exceptions, and has succeeded in reversing the judgment, and a new trial is ordered, and the cause remanded to the trial court for further proceedings, he can be tried again under the indictment without regard to the former trial and conviction. Can he plead them in bar of another trial for the offense charged in the indictment? The question is of the gravest importance to the administration of justice under the laws of this State, which provide for the

punishment and trial of offenders. It involves the construction and validity of certain sections of the Penal Code and of the Code of Criminal Procedure, which were enacted by the legislature in respect of appeals and new trials. If the reasoning of the prisoner's counsel is correct, then the defendant's appeal, based on errors excepted to upon his trial, must result, where not in affirmance, in his discharge. And in all other cases the prisoner would take his appeal from a judgment of conviction of a lesser degree of the crime charged, with the assurance that if he could secure a reversal of the judgment and a new trial he could not fare worse than before in any event. He would risk nothing and he might wholly escape punishment for the offense of which he stood charged.

Whatever conflict of opinion existed in the courts, prior to the adoption of the Code of Criminal Procedure, as to a prisoner's position upon a new trial being ordered, we hold has been settled and removed by the passage of that act of the legislature. Much of the doubt and confusion surrounding the question as to the effect of a new trial seems due to a mistaken view of the operation of the constitutional inhibition against subjecting a person to be twice put in jeopardy for the same offense. (Const. of N. Y., art. 1, sec. 6.) That provision has been the subject of much discussion in the reports and in text-books. To enter into it I do not believe to be necessary to the end we have in view in deciding this case upon principle and in construing

the statute. Its incorporation into the Federal Constitution and into the constitutions of States was but the recognition and application, in a stronger form of expression, of the common-law doctrine. In my opinion, nothing has been done in the legislative enactment of the sections of the code under consideration, to subvert the constitutional provision That provision in no-wise has the effect of restricting the power of the legislature to enact rules of procedure in criminal cases; so long as the enactment does not violate the protection guaranteed by it to a party.

The court concludes (p. 420):

If the defendant takes an appeal from the judgment of conviction, he must be deemed to have asked for a correction of errors made upon his trial, and to waive his constitutional protection. Of necessity, he must be deemed to ask for a new trial. By taking the appeal to the Supreme Court, power is conferred upon that court to continue and review the prisoner's trial, and, upon a reversal, to pronounce final judgment as it deems just, within the terms of the statute. It may affirm the proceedings below or reverse, and either order a new trial or discharge the prisoner. That no constitutional right of the party is invaded must be a self-evident proposition, for it is a privilege which is granted of which he may, but not must, avail himself. I think that the sounder doctrine which recognizes a distinction between jeopardy incurred with the consent of the prisoner and jeopardy incurred without that consent.

> We hold the jurisdiction of the Oyer and Terminer to try the defendant again under his indictment is not affected. The offense charged was within its jurisdiction, and the judgment of the trial court having been reversed for errors committed on the trial the case stands as though there had been no trial. The record is expunged and there is no determination in regard to the matter but the judgment of the appellate court. The defendant must go back and stand his trial under the indictment as though he had never been tried, for he himself has removed the bar which was effective to prevent his further trial for the offense charged.

State v. *Bradley* (67 Vermont, 465):

Bradley was indicted for murder in the first degree, but was found guilty of murder in the second degree. He took an appeal to the Supreme Court, where the verdict and judgment were set aside and a new trial granted. Upon the second trial he insisted that he could only be convicted of murder in the second degree, and requested the court to so instruct the jury. This the court declined to do, to which the defendant excepted and again appealed to the Supreme Court. Answering this contention, the Supreme Court says (p. 472):

> The prisoner was properly put on trial again for murder in the first degree, notwithstanding he had before been convicted of murder in the second degree and a new trial granted on exceptions. The authorities differ on this question. In many of the States, and probably

in a majority of them, it is held that when on an indictment for murder, the accused is found guilty of murder in the second degree it is virtually an acquittal of murder in the first degree, and that, if the verdict is set aside and a new trial granted at the instance of the accused, he can not, on such trial, be convicted of murder in the first degree; that the only effect of setting aside the verdict for the lesser crime is, to leave that issue open for another trial and also to leave undetermined the further question of whether the accused had committed any criminal homicide of a grade less than a murder in the second degree. The case of *State* v. *Belden* (33 Wis., 121) is a leading case of this kind.

But in other States the contrary is held. They say that the necessary result of reversing the judgment and granting a new trial is, to set aside the whole verdict, and that having been done at the instance of the accused, it can neither operate as an acquittal nor a bar to the further prosecution of any part of the crime charged. * * * We understand this to be the view that has obtained and been practiced upon in this State, certainly when the result of the former trial was not, in effect, as it was not here, an acquittal of another crime charged, but only a failure to find the requisites to aggravate the crime found to a higher grade. *State* v. *Kittle* (2 Tyler, 471), is not to the contrary.

Nor does this view contravene the principle that one can not be twice put in jeopardy for the same offense, for that means, without his

consent, and the matter of taking exceptions is a privilege accorded to the accused but not to the State, and he can avail himself of it or not as he pleases. If he does avail himself of it, he thereby asks for a new trial or a discharge altogether, as the case may be, and in asking for a new trial, he is deemed to waive his right to immunity from further jeopardy in case a new trial is granted. (*People* v. *Palmer*, 109 N. Y., 413, 420.) The authorities on both sides of this question are referred to in a note to *Commonwealth* v. *Arnold* (Ky.; 4 Am. St. Rep., 117)

State v. *Behimer* (20 Ohio St., 572):

Behimer was indicted in a single count for murder in the first degree. He was tried and found guilty of murder in the second degree. The verdict was "not guilty of murder in the first degree" but "guilty of murder in the second degree." He thereupon filed a motion to set aside the verdict, and for a new trial. This motion was granted. Thereupon, before his second trial, he filed a special plea alleging that the verdict of the jury upon the first trial was a bar to any further trial upon the charge of murder in the first degree. The State demurred to the plea and the trial court sustained the plea. To this the State excepted, and the case went to the Supreme Court for a ruling upon the law. Respecting the effect of setting aside a verdict and granting a new trial, the court says (p. 576):

> In a civil case there would be no doubt, where part of the issue has been found for the defendant and he should obtain a new trial, that the whole issue would be reopened for investigation

on the second trial. And Mr. Wharton states, in his work on criminal law, that in this country the uniform and unquestioned practice, down to a comparatively late period, has been to extend to criminal cases, so far as the revision of verdicts is concerned, the same principles which have been established in civil actions. (2 Am. Crim. Law, sec. 3061. See also to the same effect, *Hurley* v. *The State*, 6 Ohio, 403.)

The court continues (p. 577):

In the case now before us, if, after the granting of the new trial, the finding of the jury acquitting the defendant of murder in the first degree, stood as an adjudication of that fact, and had its full legal effect, it would preclude his retrial for any of the lower degrees of homicide.

* * * * *

But the effect of setting aside the verdict finding the defendant guilty, was to leave at issue and undetermined the fact of the homicide; also the fact whether the defendant committed it, if one was committed. The legal presumption on his plea of not guilty, was of his innocence; and the burden was on the State to prove every essential fact. The only effect, therefore, that could be given to so much of the verdict as acquitted the defendant of murder in the first degree, after the rest of it had been set aside, would be to regard it as finding the qualities of an act while the fact of the existence of the fact was undetermined. This would be a verdict, to the effect, that if the defendant committed the homicide, he did it without "deliberate and premeditated malice."

There can be no legal determination of the

character of the malice of a defendant, in respect to a homicide which he is not found to have committed; or rather, of which, under his plea, he is, in law, presumed to be innocent.

The indictment was for a single homicide. The defendant could, therefore, only be guilty of one offense, and could be subject to but one punishment. The degrees of the offense differed only in the *quo animo* with which the acts causing the homicide was committed. The question of fact was whether a criminal homicide had been committed, and, if so, whether the circumstances of aggravation were such as to raise it above the grade of manslaughter. If the finding as to the main fact be set aside, the finding as to the circumstances necessarily go with it.

* * * * *

It seems to us, therefore, that the necessary result of granting the defendant's motion for a new trial, was to set aside the whole verdict; and this having been done at his own instance, it can neither operate as an acquittal, nor as a bar to the further prosecution of any part of the offense charged. (*Stewart* v. *The State*, 15 Ohio St., 155.)

* * * * *

The court therefore states its conclusion upon the law as follows (p. 581):

Where, on a trial for murder, the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and, on his motion, a new trial is granted, the effect of granting the new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as on the first trial.

Other authorities are equally clear and strong. In *Commonwealth* v. *Arnold* (83 Ky., 1) the Court says:

> * * * There is no injustice or hardship in compelling the accused, when taking advantage of the provisions of the code in order to obtain a new trial, to submit to the provisions imposing the conditions upon which a new trial is awarded. If a conviction for manslaughter implies an acquittal of the higher offense, the accused on his own motion has asked the court to set aside the verdict from which this implication of innocence or acquittal of the graver offense arises. The conviction no longer exists, and when set aside it can not be used as evidence or pleaded in bar of the indictment. There is neither verdict nor judgment of guilt as to any degree of the offense.

Again (p. 5):

> 'There was nothing in the record, after the new trial had been granted, showing that any homicide had been committed; and if there is an implied acquittal of the offense charged in the indictment, why is not the accused entitled to an aquittal for all the lesser degrees?

Bailey v. *State* (26 Ga., 579, 581), held that:

> If the defendant rely upon the record, as he must, for his acquittal, he must plead and prove a subsisting record of acquittal. It is no record if set aside. But it is argued that the acquittal of the offense of murder remains, although the verdict of guilty of manslaughter is set aside. The verdict of guilty of manslaughter is only

> an implied acquittal of the accused of the charge of murder, and if the verdict from which that inference is drawn, is set aside, nothing is left to sustain the inference. The verdict and its incidents fall together.

Small v. *State* (63 Ga., 336) is in line with the decision in the Bailey case.

In *State* v. *Terreso* (56 Kan., 126) the statute of Kansas provided that "the granting of a new trial places the parties in the same position as if no trial had been had." The court quotes the following language from the opinion in *State* v. *Hart* (33 Kan., 218):

> Upon the defendant's motion for a new trial the court granted just what he asked, and of course he waived all right to object to the legal consequences resulting from such grant. He waived his right to plead former jeopardy or to again being tried for the same offense.

In *Kansas* v. *McCord* (8 Kans., 232, 243), speaking with respect to the waiver by a person accused of crime of his right to plead former jeopardy, the court says (p. 243):

> Whatever may be the proper rule as to the extent of the waiver when there is no statute, it is plain that where the statute has fixed the necessity, it has also there placed the extent of the waiver. In this State the necessity is that the party should waive the entire right so as to bring himself within the power of the court to grant him a new trial. His waiver goes no further than his necessities. He makes his motion

with a full knowledge of the risks he takes, and of all the possible consequences. To obtain a new trial, he voluntarily waives a right that neither courts nor the legislature can take from him—a right that he surrenders for his own benefit, and the exact extent of which was plainly written, as the terms on which it could be done, when his motion was allowed.

The language in *Veatch* v. *State* (60 Ind., 291, 295), is:

> Now, it would seem, that if a party takes a new trial in a criminal case, he takes it on the terms prescribed by the statute, and consents to be placed "in the same position as if no trial had been had." If this is so, where a party has been tried on an indictment for murder, and convicted of manslaughter, and has obtained a new trial, he may, upon the new trial, be convicted of murder; for, by obtaining the new trial, he consented to be placed in the same position as if no trial had been had.

Bohanan v. *State* (18 Neb. 57) is a leading case, and holds that a person who, after conviction, secures a new trial, may be retried upon the highest offense included in the indictment. Speaking with respect to the provision of double jeopardy, the court says (p. 61):

> The prisoner stands charged with the unlawful killing of the deceased. He is either guilty or not guilty. If found guilty it is the next duty of the jury to ascertain the magnitude of his guilt. When that is done the verdict of guilty is one with a finding as to the grade of that guilt.

Again (p. 69):

> It is beyond the comprehension of the writer to say that the *character* of an act may be finally and forever decided upon and adjudicated, while the fact of the act itself is left untouched. * * * But suppose a new trial is granted. There is no adjudication that any person has been killed nor that any crime has been committed.

Answering the claim made that many of the decisions holding that a person may be retried for the higher offense after a conviction of a lower grade of offense are based upon State statutes, the court says (p. 76):

> It is true the decisions referred to have in some instances been predicated upon the statutes referred to, and did a similar statute exist in this State most of the trouble of this case would be obviated. But it may also be observed that if the clause in the Bill of Rights in both the Federal and State constitutions—that a defendant shall not be twice put in jeopardy of life or limb for the same offense—is to be his protection, as argued by his counsel, it is quite clear that a simple legislative enactment of the States can not overrule or take away this protection, and the enactments referred to would be unconstitutional and void, and would form no basis for the decisions.

I have printed as an Appendix to this brief a review of the common law on the general principles, and the English statutory changes.

V.

THE SUMMING UP.

This then is the case: The peculiar function of the jury to try conclusively all issues of fact does not enter in here. The proper court or judge takes its place.

This Philippine proceeding is not a review on alleged errors of law alone or an ordinary motion for a new trial, which would result, as in this country—the defendant prevailing—in sending the case back to another jury for a new trial. It is itself, this appeal of the defendants, a new trial on their motion, and is properly submitted as such to the appellate court. If the defendants could produce newly discovered evidence and desired a trial *de novo* before the Court of First Instance, that mode of remedy was open to them under the law.

The choice is between new trial by the single judge in first instance and the appellate court *in banc*. There is no principle of justice or jurisprudence which makes the former mode a greater safeguard of the accused and an exclusive right.

In this country, under analogous circumstances, the sound view is, despite adverse authorities, that a new trial on defendant's motion wipes out the previous determination and leaves no former jeopardy against the constitutional inhibition. This view, opposing the doctrine of implied acquittal, has the sanction of eminent judges of this court when the question has come before them, directly or indirectly, on circuit.

The defendant waives any such claim by seeking trial *de novo;* if it is made and granted on his behalf, he has an immense advantage over the forces of criminal justice—he has nothing to lose and everything to gain. In modern times the tenderness toward accused persons and the conception of their peril should not be emphasized by drawing on a past when their situation was very different. Now the reasons for straining construction for their benefit have largely disappeared. If every possible intendment and presumption must run for them, the protection of society is steadily weakened, until it sometimes seems as if the defense was intrenched and the prosecution had no rights.

As was said by Mr. Justice Holmes in his dissenting opinion in the *Kepner case, supra* (195 U. S., at p. 134):

> At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny.

And, relative to this, does it seem, to an impartial mind, on reading the record of the facts, that six months' imprisonment and a compensation of 100 pesos to the victim's family, was a just punishment for this brutal and dastardly crime?

It may be added that if constitutions mean what is claimed, statutes affirmatively permitting a new trial to be a *tabula rasa* are invalid; and yet see the remarks of Mr. Justice Miller in the *Kring case* (107 U. S., 221, 225, *ut supra*, p. 31). On the one hand, the Philippine law is tantamount to such a statute in a

State; on the other hand, Justices Grier and McLean have said (or implied) that the Federal Constitution does not throw the protection against second jeopardy around a criminal who seeks a new trial.

The judgment below should be affirmed; all of which is respectfully submitted.

HENRY M. HOYT,
Solicitor-General.

APPENDIX.

THE COMMON LAW VIEW OF THE GENERAL PRINCIPLES AND THE ENGLISH STATUTORY CHANGES.

The common law development does not reckon with the feature of a new trial or an appeal on behalf of the accused. After very careful search no definite statement of the modern English rule upon a new trial at the motion of an accused person can be discovered. The following review may appear to be remote from the exact point and tedious in its detail, but it seems necessary in order to reach logically the summary of the evolution.

One of the early references to the fundamental safeguard of a defendant in the pleas of former acquittal or conviction is found in Hale's Pleas of the Crown (1st Am. ed., vol. 2, p. 245), as follows:

> But if a man be acquit generally upon an indictment of murder, *autrefois acquit* is a good plea to an indictment of manslaughter of the same person, or, *e converso*, if he be indicted of manslaughter and be acquit, he shall not be indicted for the same death, as murder, for they differ only in degree, and the fact is the same (4 Co. Rep. 46 b, Holcroft's case, *per cur.*), and upon the same reason *autrefois acquit* upon an indictment of murder is a good bar to an indictment of petit treason, and *e converso*.

The Holcroft case is stated in part 3 of Coke's Institutes, page 130. The old appeal of murder was brought against Holcroft, and his plea was a confession of a former indictment of manslaughter for the same act, praying his clergy; and on demurrer it was adjudged that the clergy ought to have been allowed, and that the bar was good under common law as well as if clergy had been allowed. This case is also referred to at length in 4 Coke's Rep. (London ed., 1826) at *46 b, and the following conclusion deduced:

> If a man commits murder and is indicted and convicted or acquitted of manslaughter, he shall never answer to any indictment of the same death, for all is one and the same felony for one and the same death, although murder is, in respect of the circumstances of the forethought malice, more odious; and therefore in an indictment or appeal of murder he may be found guilty of manslaughter.

Hawkins' Pleas of the Crown (Book 2, London, MDCCLXXXVII, p. 537) refers to the case thus dubiously:

> It is said to have been adjudged in Holcroft's case that a verdict finding a man guilty of homicide *se defendendo* on an indictment of murder may be pleaded to an appeal of the same death. But this was certainly not the very point in question in that case, neither do I find it expressly taken notice of in any report of it.

(See, for the argument of defendant's counsel, which prevailed, 2 Leonard, 160.)

The other reported cases of that period, i. e., during the century between Elizabeth and Charles II, when the rule of Holcroft's case may be regarded as established, present chiefly the inquiry whether on a charge of murder manslaughter could be found. Authorities

cited in Coke and Hawkins, *ut supra*, and particularly *Wroth* v. *Wiggs* (34 Eliz.), an appeal of murder after indictment for manslaughter, and confession and allowance of clergy thereon, adjudged that plea of *autrefois convict* was good bar; "evidence was pregnant that he was guilty of manslaughter, but for the murder was doubtful," verdict not guilty of murder and refusal to inquire of manslaughter, which Common Pleas advised King's Bench the jury were not compellable to do; Croke, 1st part, 276, and 4 Co. Rep., 45 b–47b; see *infra;* Barley's Case, 35 Eliz., Croke, *ut sup.*, 296, where an indictment for murder followed the appeal of murder in which manslaughter was found notwithstanding *Wroth* v. *Wiggs*, and the plea of former conviction to the indictment was judged a good plea; *Perin* v. *Corbet*, 37 Eliz., Moore's Cases, 407, in which the defendant, in an appeal by Perin, was acquitted of murder and found guilty of manslaughter, but it was held nevertheless that the plaintiff could not be nonsuited, meaning, it would seem, that the private remedy could be enforced in case of death, although the graver charge fell; *Sir Chas. Blunt's case* (22 James I, Rolle, 460), an appeal of murder by a widow for her husband's death, after indictment—there was a point whether the examination on the indictment could be offered in evidence by the plaintiff, ruled in the negative unless the defendant assents, because this is a suit of revenge, and evidence shall be *viva voce* even in trivial actions; "the matter here is murder, but the jury are at liberty to find it manslaughter," and the jury found it so; *Bassage's case*, Chas. I, Latch, 126, determined as in Blunt's case.

A very learned and interesting opinion of Chief Justice Holt in *Armstrong* v. *Lisle* (Wm. III, Kelyng's

Crown cases, reprint of 1873, p. 135) explores the entire subject, referring to the obscurity and variety of opinion in which the matter has lain, and shows that the rule of Holcroft's case was established *in favorem vitæ* because, among other things, the private prosecution under an appeal of murder having a certain preference over the King's indictment, the latter was delayed for the benefit of the parties' appeal if the former was not in readiness, and, if tried, judges would not act on the claim of clergy, or refused it or delayed to enter judgment, all to prevent the bar either of a previous discharge or complete conviction as conclusive on the appeal. It is not strange that judges were diligent to find and establish such safeguards under these circumstances, when, in addition, the claim of clergy itself if allowed, although it avoided the greater penalty, meant purgation by fire—that is, burning in the hand—and in the more heinous offenses, a year's imprisonment was entirely consistent with the allowance of clergy; and when, finally, it was the ancient law "that when a man had judgment to be hanged in an appeal of death, the wife and all the blood of the party slain should draw the defendant to execution." (*Armstrong* v. *Lisle*, *passim*; 3 Co. Inst., *cap.* 57.)

A controlling statute of early date was the act of 3 Henry VII, cap. 1, which provided that on acquittal of felony or murder, or attaint thereof, the wife or next heir of him slain may have their appeal of the same death or murder against the persons so acquitted or attainted, unless benefit of clergy is before allowed. The view of this statute by the authorities of the following period was dubious. Coke, in the Institutes (*ubi supra*), says that Holcroft's case was adjudged

to be out of the statute, for he was neither acquitted nor attainted, but convicted by confession, and the benefit of clergy prayed; the statute, being penal concerning the life of man and made in restraint of the common law, was not to be taken by equity, but is *casus omissus*, and left to the common law. But under the report of *Wrote* (or *Wroth*) v. *Wigges* (*supra*), at 4 Co. Rep., 45b *et seq.*, there is a discussion of the Holcroft case and this statute, and it was said (as in the Institutes) to have been resolved in that case that the bar was good at common law unrestrained by the act, for if an offender is attaint and has clergy, it is excepted out of the act; *a fortiori* when he is but convicted and prays clergy and the act of the court (to be advised respecting the allowance) shall not prejudice a party in case of life. But it was also said to have been resolved that "attainted" shall extend to a person *convicted* by confession or verdict, because by statute and in common speech the two terms are often used interchangeably; otherwise the purview of the act would be overthrown, and the law would enable a party to appeal against a person acquitted, who by judgment of law is innocent, and would forbid him to proceed against one convicted, who is found guilty. These consecutive statements of what was adjudged in Holcroft's case seem quite irreconcilable. But it appears from Sir John Holt's review in *Armstrong* v. *Lisle* (who notes the obscurity and variety of opinion on the topic) that the liberal view of the statute *in favorem vitæ* and its strict construction accordingly as penal was established, for he says: "It is not enough to say that where there is an absolute acquittal he should be liable to the appeal, therefore much more where he is

convicted of manslaughter and acquitted of the murder; for first the statute 3 H. VII makes him liable in the one case and exempts him in the other. * * * The statute of 3 H. VII is severe in overthrowing a fundamental point in law, in subjecting a man that is acquitted to another trial, which is putting his life twice in danger for the same crime; therefore the purview of 3 Henry VII ought to be taken strictly and the exception favorably." (Kelyng's Crown Cases, pp. 147, 148.

It thus appears that under English law it was formerly possible to subject one absolutely acquitted or convicted of crime to another independent liability to private parties for the same capital offense, unless, in case of conviction, the peculiar privilege of clergy was well pleaded and allowed. But now, all such perils and oppressions having disappeared, the reasonable demand is that on a defendant's own proceeding to correct supposed errors the issues shall be viewed as thereby kept open for all purposes—to do justice as well as correct supposed errors in his behalf. In the light of the facts in the present case it is difficult to understand what the defendants could reasonably expect to secure by their appeal. Did they think that they ought not to be punished at all, or even be commended for their brutal deed as public service?

Passing by intermediate liberalizing statutes which enlarge the rights of the prosecution, I note especially two recent acts of this nature:

The statute (14 and 15 Vict., c. 100) provided (sec. 9) that a party indicted for felony or misdemeanor may be found guilty of an attempt and punished accordingly. "And no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted

for an attempt to commit the felony or misdemeanor for which he was so tried."

The tenth section of that act sets out that a previous act of Victoria in reference to certain offenses where the crime charged includes an assault, prescribing that it shall be lawful for the jury to acquit of the felony and convict of the assault, had been found to present difficulties in construction. Section 11 thereupon proceeds to provide that on an indictment for robbery, the jury may convict of an assault with intent to rob, and then follow the same provisions as at the end of section 9, viz, that there should be no liability for subsequent prosecution for an assault with intent to rob. Section 12 provides that if upon trial for a misdemeanor it appears that the facts amount to felony, the defendant shall not be entitled to be acquitted of the misdemeanor, but no person tried for a misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the trial court shall think fit to discharge the jury and to direct an indictment for felony, in which case the defendant may be dealt with as if he had not been put upon trial for the misdemeanor.

The comment on this statute in Russell on Crimes (6th ed., vol. 1, p. 62) is that since the passing of that law the doctrine of merger has become of less importance:

> How far, apart from the statute, a conviction for a misdemeanor would be a bar to a conviction for a felony upon the same facts is a matter of some doubt. The question is much discussed in *Reg.* v. *Morris* [36 L. J. M. C., 84, *infra*].

The note at this point in Russell contains a quotation from the opinion of Pierpoint, C. J., in *State* v.

Smith (43 Vt., 324, 326), in which reference is made to the conflict in the authorities upon the subject, but the rule is regarded as established that when one offense is a necessary element in and constitutes an essential part of another, and both are in fact one transaction, a conviction or acquittal of one is a bar to a prosecution for the other. But, see the opinion of the Supreme Court of Vermont, when a new trial on prisoner's application intervenes, in *State* v. *Bradley*, *ante* p. 35).

Sec. 41 of 24 and 25 Vict., c. 96, repeats the provision of section 11 of 14 and 15 Vict. (*ut supra*) as to robbery and assault with intent to rob.

In *The Queen* v. *Morris* (36 L. J. M. C., 84) there was a summary conviction before justices for assault, and upon the death of the man assaulted, a subsequent indictment for manslaughter. Kelly, Chief Baron, dissented from the judgment of the court, which was (all of the other judges concurring) that a new offense arose when the man died; that it was not "the same cause" under the statute releasing from all further proceedings (sec. 45, 24 and 25 Vict., c. 100); that a murderer, by suffering or obtaining a previous conviction for assault, might escape the due punishment of his crime.

Queen v. *Tancock* (Denman, J., 13 Cox Crim. Cas., p. 217) refers to Holcroft's case as not stating whether the indictment (as distinguished from the subsequent appeal of murder) was for murder or manslaughter:

> For it was possible that the indictment may have been for murder and the conviction for manslaughter, in which case the prisoner would have been in jeopardy of being convicted of an offense of which he had clearly been acquitted; whereas in the present case the prisoner never

has been in jeopardy of a conviction for murder, the fact of a bill for murder having been sent before the grand jury making no difference in this respect.

On this view of the case, and because the opinion of the judges was very strong that it would be idle to expect a verdict of murder, he directed the issue in favor of the prisoner. But in that case the prisoner was tried for the manslaughter of A, found guilty and sentenced, the grand jury having ignored an indictment for murder and returned one for manslaughter. Shortly after that trial an inquisition for willful murder upon the same facts was returned.

Lord Denman said, however, that if he thought, on the depositions, that the act was probably murder, and that the jury would probably think so, he should try the prisoner for murder and reserve the law point to the Court for Crown Cases Reserved.

See for a modern review on pleas of former acquittal and conviction, Archbold's Criminal Pleading, etc., twenty-second edition, pages 155–162.

The English rules of practice regarding new trials appear to be much less liberal toward defendants than our own. Among the distinctions between felonies and misdemeanors which have survived down to present times is this: That although a new trial upon conviction may be granted in case of misdemeanors, it was not so in case of felonies; in the higher class of offenses where life was imperiled an appeal was not allowed. The fundamental ground on which appeal is denied in the event of acquittal is that when once a man has gone through the suspense and distress of mind consequent on a criminal charge of this nature, he should not be again put in jeopardy. Arguing

that it is a strange application of the fundamental maxim, to keep a prisoner under sentence on an illegal conviction as if it were legal, on the ground that he ought not to have a chance of being duly acquitted, because he would be exposed to the risk of being duly convicted, an English writer reviews the authorities (Law Magazine and Review, 4th series, vol. 6, p. 238; 1881; "New Trials in Felonies"), quoting from certain remarks of Lord Chancellor Napier, of Ireland, in support of the proposition that although, where there has been a lawful verdict found on a valid indictment, no second trial is allowed on the same charge for the same offense, a new trial ought to be granted where the first trial has been legally abortive, and the principle not to try a person twice on the same charge should not apply to that situation. This view seems very familiar in this country, but the English rule is still otherwise.

In *Queen* v. *Scaife* (17 Q. B., 238) a new trial was granted where there had been a conviction for felony, on the ground of an improper reception of evidence and a palpable failure to direct the jury correctly. But this case was overruled in *R.* v. *Bertrand* (L. R., 1 P. C., 531) and *R.* v. *Murphy* (6 M. P. C. Ca., 177). The decision in *R.* v. *Scaife* was considered an innovation on the settled course of criminal law not warranted by practice or precedent, and so in the later cases cited, the judicial committee of the Privy Council refused to regard it as an authority to be followed. Up to the hearing of *R.* v. *Scaife* it was assumed that no new trial could be granted in case of felony, and in *R.* v. *Bertrand* Sir J. Coleridge observed there was but a single case reported in which an application for a new trial in felony had been made, and but one—the

same case, of course [*Queen* v. *Scaife*]—in which it had succeeded.

In the course of the discussion in the article cited it appears that the historic remedy where justice has not been done was to stay the judgment (*King* v. *Holt*, 5 T. R., 445). But while a man is not to be put in peril a second time after verdict pronounced on a good indictment (although it does not follow that if the first trial has proved abortive the questions involved in the indictment shall not be submitted to a second jury) (*Thomson* v. *The Queen*, 6 B. and S., 186), nevertheless there are authorities showing that new trials have been granted even where the defendant gained a verdict, as in *Queen* v. *Chorley* (12 Q. B., 515) (a misdemeanor), the court granted a new trial, although Lord Denman said the proper course was to stay the judgment. This, however, would seem to be simply a less serious degree of refusing to give a defendant the full benefit of an acquittal.

The tendency to disregard an abortive trial or mistrial, now well established when the proceedings *de novo* are founded upon a new indictment, appears to have been marked for a long period in English law in favor of the right of the prosecution to have a review. In *Queen* v. *Russell* (3 Ell. & B., 750) Lord Campbell is reported to have said: "I for my own part reprobate the recent speculations as to the propriety of granting a new trial after acquittal for felony and murder. If there be an improper conviction, it ought to be set aside, but I hope the same practice will never prevail in the case of an acquittal." (But see for the authorities that in some cases, as of minor misdemeanors and for certain causes where the defendant is in fault, even after acquittal, a new trial may be granted, Archbold, *ubi supra*, p. 265.)

It appears to be now settled that a new trial can not be granted in felony. (Archbold's Criminal Pleading, *ut sup.*, p. 264.)

There is a distinction between a new trial and a *venire facias*. In the first, after the rule for a new trial is granted and the trial had thereon, the record is as if no trial but the one had taken place; whereas on the award of the *venire de novo* the first trial and the circumstances which rendered that trial nugatory necessarily appear on the record. The new *venire* is granted for defects apparent on the record; a new trial is discretionary.

There is no distinct statement of the issues open in case of a new trial, but "when a writ of *venire facias de novo* is awarded, the parties stand precisely as they did before the first trial, and the whole of the facts are to be reheard." (Archbold, p. 268.)

In *Reg.* v. *Drury*, 3 Cox Crim. Cas., 544 (1849), the parties had been indicted for inciting other persons to destroy certain machinery. They were tried, found guilty, and sentenced to greater punishment than the statute provided. Upon their prosecuting error, the judgment was set aside. Thereupon a new indictment was returned against them. To this indictment they pleaded former conviction. This plea was overruled and they were given leave to plead not guilty. Speaking of the effect to be given to the reversal of the judgment, Justice Coleridge says (p. 546):

> A man who has been tried, convicted, and attainted on an insufficient indictment, or on a record erroneous in any other part, is in so much jeopardy literally that punishment may be lawfully inflicted on him unless the attainder be reversed in a court of error; and yet when that is done he may certainly be indicted again for

> the same offense, and the rule would be held to apply that he had never been in jeopardy under the former indictment. The true meaning, therefore, of "not having been in jeopardy" in this rule seems to be that by reason of some defect in the record, either in the indictment, place of trial, process, or the like, the prisoners were not lawfully liable to suffer judgment for the offense charged on that proceeding, and, so understood, it is true in the present instance. The judgment reversed is the same as no judgment; upon a record without any judgment no punishment can be suffered. * * *

If one who, by reason of error occurring upon his trial, secures a reversal of the judgment may again be indicted and tried for the same offense, then it would seem to follow that he may be retried for the same offense upon the same indictment without violating the rule respecting double jeopardy. Certainly the effect of the setting aside of the judgment ought to be the same in each case—that the former judgment, so reversed, will operate neither as a bar to a new indictment nor to a retrial upon the old.

Archbold (Crim. Pl. and Pr., 22d ed.) states the rule in these words (p. 157):

> And generally it may be laid down that whenever, by reason of some defect in the record, either in the indictment, the place of trial, the process or the like, the defendant was not lawfully liable to suffer judgment for the offenses charged against him in the first indictment as it stood at the time of its finding, he has not been *in jeopardy* in the sense which entitles him to plead the former acquittal (or conviction) in bar of a subsequent indictment.

Again (p. 159):

> A plea of *autrefois convict*, which shows that the judgment on the former indictment has been reversed for error in the judgment, is not a good bar to another indictment for the same offense.

And he cites the case of *Reg.* v. *Drury* as the leading case upon the point.

On the foregoing I submit that the following observations are sound:

The rule as determined in England has always applied to a later, separate indictment on the same state of facts covered by an earlier conviction or general acquittal. The early application of the rule on a former conviction or acquittal was complicated, on the one hand, by the privilege of clergy, which has now disappeared, and on the other, by the old appeal of murder which ran back to family and blood feuds and needed control by humane judges. Even so—that is, even under the common law view of the matter with a modern statute (as in the *Morris* case) emphasizing the accused person's claim—the English courts have not allowed the plea of previous conviction to interfere with the due punishment of crime; and a very able judge of modern times, after conference with his colleagues, expressed the view that he would try a prisoner for murder where the facts were doubtful, notwithstanding this plea, reserving the law point for an appellate court, although originally the charge of murder was ignored, manslaughter returned and found upon trial, and the murder charge was again brought forward afterwards upon the inquisition of a coroner's jury.

The point as to the effect of a prisoner's own intervention by way of an appeal or new trial is an entirely

new element in the situation, and the English view of this precise matter, if it is settled there at all, escapes search. I presume that the decisions do not report such an issue simply because, where there is no new indictment, but the same one, and the prisoner of his own motion seeks to have the judgment thereon set aside, he is considered in England not to be entitled at all to their common law or statutory rules respecting the pleas of *autrefois convict* or *acquit* when a new indictment for the same offense is on trial. Furthermore, I submit that when the English statutes provide that one indicted for felony or misdemeanor may be found guilty of an attempt and punished accordingly, or one indicted for robbery may be convicted of an assault with intent to rob, and then provide that no person tried accordingly shall be liable to be afterwards prosecuted for the attempt or the assault, the inference is plain, first, that an accused person may be prosecuted afterwards for the substantive and larger crime, and, second, that on his own proceeding for a reversal of the conviction of attempt or assault in the respective cases he may be tried *de novo*, if he obtains a new trial, on the whole contents of the original indictment.

It is plain that the English statutes and practice show a proper liberalizing of conceptions so that manifest criminals shall not escape under the hard and fast enforcement of the technical doctrines of an earlier day.

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